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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911-[illegible] 1914

No. ~~950~~ 526 [illegible] 19

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY AND UTAH CONSTRUCTION COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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FILED JANUARY 24, 1912.

(23,026)

(23,026)

SUPREME COURT OF THE UNITED STATES.

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MINIDOKA & SOUTHWESTERN RAILROAD COMPANY AND UTAH CONSTRUCTION COMPANY, APPELLANTS,

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No. 1930

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY (a Corporation),

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Idaho, Central Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

[Names and Addresses of Attorneys.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Complainant and Appellant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants and Appellees.

C. H. LINGENFELTER, Esq.,
B. E. STOUTEMYER, Esq.,
Residence, Boise, Idaho.
Attorneys for Appellant.

P. L. WILLIAMS, Esq.,
D. WORTH CLARK, Esq.,
Residence, Pocatello, Idaho.
Attorneys for Appellees.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, THE UTAH CONSTRUCTION COMPANY,
Defendants.

Bill of Complaint.

The United States of America, by C. H. Lingenfelter, United States Attorney for the District of Idaho, acting in this behalf by direction of the Attorney General of the United States, brings this its bill of complaint against the Minidoka & Southwestern Railroad Company, The Utah Construction Company, ——————— ——————— citizens of and residents within the State of Idaho and County of Cassia and thereupon alleges:

I. That the defendant, Minidoka & Southwestern Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Idaho. That the Utah Construction Company is a corporation organized and existing under and by virtue of the laws of the State of Utah and duly authorized to do business in the State of Idaho and doing business in the State of Idaho and County of Cassia. That the defendant, The Utah Construction Company is a contractor acting under contract with the Minidoka & Southwestern Railroad Company, and that defendants ——————— and ——————— are sub-contractors acting under the defendant, The Utah Construction Company.

2. That this complainant, The United States of America, operating under the provisions of the Act of Congress approved June 17, 1902, (32 Stat. 388) known as the Reclamation Act, has constructed and is now operating a certain irrigation project in the State of Idaho and counties of Lincoln and Cassia consisting of a diversion dam across Snake River

Reservoir on Snake River and numerous canals, laterals, irrigation ditches and drainage ditches also an electrical power plant and transmission lines connecting with pumping stations by means of which water is pumped for the irrigation of the lands lying above the gravity canals, all of which said canals, laterals, ditches, transmission lines and irrigation works have been constructed under the authority of the United States under the provisions of the Act of Congress of June 17, 1902, (32 Stat. 388) on rights of way located upon the withdrawn public lands of the United States or upon rights of way granted to the United States by the State of Idaho or by private parties. That the United States is the owner in fee of all of said ditches, canals, laterals, drains, transmission lines and irrigation works and is in possession thereof and entitled to the possession thereof. That the United States is the owner in fee of said rights of way and is now and for more than five years last past has been in possession thereof, open notorious and adverse, and entitled to the possession thereof.

3. Under the said canals and irrigation system of the complainant as at present constructed, there is about one hundred and thirty thousand acres of irrigable land, and it is the purpose of the complainant to extend said project by means of a feasible pumping system on the North Side for the irrigation of about one hundred and twenty thousand acres in addition to the one hundred and thirty thousand acres under the present canals, making about two hundred and fifty thousand acres in all, said exten-

sion being known as the North Side Pumping System or the North Side Extension of the Minidoka Project. That all of the said lands under said Minidoka Project and the extension thereof are arid in character and require irrigation to produce agricultural crops thereon, but are very rich and productive when irrigated. That the said Government ditches, canals, and irrigation works and the proposed extensions thereof are the only means for the irrigation of said lands. That the gravity system of the Minidoka Project is practically completed, of sufficient capacity for the irrigation of the gravity lands lying thereunder and has been in operation for several years but additional drain ditches are required and are being constructed from time to time as needed. Also some of the canals of said system will have to be enlarged when the North Side Extension is built in order to supply the additional amounts of water required for the North Side Pumping System. The South Side Pumping System of the Minidoka Project is under construction and partly in operation, but additional canals and ditches and enlargements are necessary for the irrigation of parts of said South Side Pumping section of the Minidoka Project. The North Side Pumping System or the North Side Extension of the Minidoka Project is not yet constructed. About ninety per cent of the said lands under said Minidoka Project and the proposed extension thereof are reserved and withdrawn public lands of the United States, the remaining ten per cent being chiefly state lands of the State of Idaho.

4. In connection with said Minidoka Project, the

Secretary of the Interior has withdrawn under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), known as the Reclamation Act, the following subdivisions of land among others and has specially reserved said lands from sale and has not restored the same to entry or sale, to wit:

Sections nineteen (19), twenty (20), and thirty (30) of Township ten (10) South, Range twenty-three (23) East, B. M., and Section twenty-five (25), Township ten (10) South, Range twenty-two (22) East, B. M., and Sections one (1), twelve (12), eleven (11), fourteen (14), Township eleven (11) South, Range twenty-two (22) East, B. M., and the State of Idaho has heretofore granted to the United States rights of way for the existing and proposed canals and ditches of said Project across all state lands on said Minidoka Project including Sections sixteen (16) and thirty-six (36) of said townships.

5. That the defendant, the Minidoka & Southwestern Railroad Company has gone upon said above described reserved lands after the withdrawal thereof and has surveyed and laid out a line of railroad across the same from Burley, in Cassia County, Idaho, in southerly direction to Oakley in Cassia County, Idaho, said railroad line and said reserved lands being more particularly shown on the attached map which is made a part of this Bill of Complaint, but the said defendant has not obtained from the United States any right of way for said railroad line across said reserved lands or any part thereof nor permission to construct the same. Neither have the surveys and plats of said proposed railroad line

been approved by the Secretary of the Interior of the United States Land Office, but the said defendants, the Minidoka & Southwestern Railroad Company and the Utah Construction Company, wrongfully and in violation of law and in violation of the rights of the complainant have gone upon said reserved and withdrawn public lands of the United States with a large force of men and teams and machinery and have let contracts for the construction of said railroad and railroad grade thereon.

6. That wrongfully and in violation of law and in violation of the rights of the complainant, the defendants herein have gone upon the reserved and withdrawn public lands of the United States described in Paragraph Four of this Bill of Complaint with large forces of men and teams and machines and are constructing and threatening to construct said railroad and railroad grade thereon and are cutting up said lands with numerous embankments, cuts, fills, and borrow pits.

7. That wrongfully and in violation of law and in violation of the rights of the complainant, the defendants herein have gone upon the ditches, canals and irrigation works of the United States on said Minidoka Project and the rights of way thereof and also upon the rights of way required for the construction of the canals and laterals which are necessary for the irrigation of the arid lands located in the said Minidoka Project and are threatening and preparing to construct said railroad and railroad grade on and across said ditches, canals and rights of way.

7½. That wrongfully and in violation of law and in violation of the rights of the complainant, the defendants are cutting up and digging out and destroying portions of the irrigable agricultural public lands of said Minidoka Project upon which the United States depends for the return of the money expended by the United States in the construction of said project and in order to furnish water to such lands. That by converting said lands into holes and fills and borrow pits, the defendants are utterly destroying portions of said land and greatly impairing the value of other portions for irrigation and agricultural purposes and for the return to the United States of the money expended for the irrigation thereof, although said lands are public lands of the United States and have been especially withdrawn and withheld from sale under authority of law for the purpose of insuring the return of such costs of construction and full compliance with all the provisions of the said Act of June 17, 1902.

That by tearing up and digging out said lands and throwing up grades and embankments thereon the defendants are obstructing and impairing the value of the rights of way for the future canals and ditches to be hereafter constructed under the authority of the United States for the irrigation and reclamation of the lands of said Minidoka Project.

That the said rights of way for said canals and ditches both present and future are west of the one hundredth meridian and are now and for more than nineteen years last past have been withdrawn and

reserved from sale by the United States under the provisions of the Act of Congress of Aug. 30, 1890 (26 Stat. L. 391) and particularly under the following section thereof:

"That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States," and afterwards and before the defendants' said entry and unlawful acts said lands were also withdrawn and reserved under the provisions of the said Act of June 17, 1902, hereinabove set out.

8. That the grades on many of the canals and ditches of the Minidoka Project which the said defendants are threatening to cross with their said railroad and railroad grade are very light and any obstruction or interference with the flow of the water in said canals and ditches or any loss in the surface elevation of the water in said ditches will result in throwing out of cultivation of large tracts of land which can be and now are being irrigated from said ditches and will render said tracts again a desert to the great and irreparable injury of the United States and to numerous settlers on said tracts of land.

9. That the said railroad and railroad grade will obstruct and cut off the rights of way required for the numerous additional canals and laterals and enlargements of existing canal which are necessary

for the irrigation and reclamation of the arid lands in portions of said Minidoka Project, and render it impossible to irrigate and reclaim said lands without numerous and expensive siphons and bridges, to the great and irreparable injury of the complainant.

10. That by the cutting up of said reserved public lands of the United States into cuts and embankments and borrow pits by said railroad, great and irreparable damage will be done to the complainant.

11. That by reason of the defendants' said unlawful acts the complainant has been damaged to the extent of Fifty Thousand ($50,000.00) Dollars.

12. That there is no speedy, adequate or complete remedy at law. That the defendants are now actively engaged in the aforesaid trespass and wrongful acts and are rushing said work to completion, and unless a temporary restraining order is granted at once, said wrongful acts will be fully consummated to the irreparable injury of the complainant.

Wherefore, the complainant prays that process issue out of this court requiring the defendants to appear and to fully and truly answer all the allegations of this bill, but not on oath, answer on oath being hereby expressly waived.

That by the order of this Court the defendants and each of them and their officers, agents and employees be perpetually enjoined, prohibited and restrained from going upon said reserved lands or any part thereof or upon said canals or rights of way and from constructing or causing to be constructed

or excavated thereon any railroad or railroad grade or any cut or embankment or fill or borrow pit or any structure of any nature whatsoever.

That a temporary restraining order and an injunction as prayed for herein, issue immediately upon the filing of this complaint, and that the defendants be ordered to appear and show cause why said injunction should not be made permanent.

That the complainant have judgment against the defendants for damages as herein alleged in the sum of Fifty Thousand ($50,000.00) Dollars and for costs of suit and for such other and further relief as to the Court shall seem equitable and just and complainant will ever pray.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho,
Boise, Idaho.

B. E. STOUTEMYER,
Attorneys for Complainant, Boise, Idaho.

State of Idaho,
County of Lincoln,—ss.

P. M. Fogg, being first duly sworn, on oath says that he is Acting Project Engineer of the United States Reclamation Service for the Minidoka Project, Idaho, and as such is the agent of the United States in charge of the Minidoka Project described in this Bill of Complaint, that he has read and knows the contents of the foregoing Bill of Complaint, and that the same is true of his own knowledge, except as to the matters herein stated to be upon information or belief and as to those matters he believes

them to be true.

P. M. FOGG.

Subscribed and sworn to before me this 17th day of December, 1909.

[Seal] WM. LYMAN,
Notary Public.

[Endorsed]: Filed Dec. 29, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the Central Division of the District of Idaho.

No. 71—IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, THE UTAH CONSTRUCTION COMPANY,
Defendants.

Subpoena Ad Respondendum.

The President of the United States of America to Minidoka & Southwestern Railroad Company, The Utah Construction Company, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the courtroom thereof, in Boise in said District, on the first Monday of February, next, which will be the Seventh day of February, A. D. 1910, to answer the exigency of a bill of complaint exhibited and filed against you in our said

court, wherein The United States of America is complainant, and you are defendants, and further to do and receive what our said Circuit Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our Writ of Subpoena and to have then and there the same.

Hereof fail not.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of our said Circuit Court affixed at Boise in said District, this 29th day of December, in the year of our Lord One Thousand Nine Hundred and nine, and of the Independence of the United States, the One Hundred and 33d.

[Seal] A. L. RICHARDSON,
Clerk.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the Clerk of said Court on or before the day at which the above Writ is returnable; otherwise the Complainant's Bill therein may be taken *pro confesso.*

[Endorsed]: No. 71. In the Circuit Court of the United States for the Central Division of the District of Idaho. In Equity. The United States of America vs. Minidoka & Southwestern Railroad Company et al. Subpoena Ad Respondendum. Re-

turned and filed Jan. 20, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY et al.,

Defendants.

Affidavit of P. M. Fogg.

State of Idaho,
County of Lincoln,—ss.

P. M. Fogg, being first duly sworn deposes and says:

That he is Acting Project Engineer of the U. S. Reclamation Service, employed on the Minidoka Project, and as such is familiar with said project and conditions thereon.

That the Minidoka & Southwestern Railroad Company and the Utah Construction Company and their sub-contractors, agents, and employees are now actually engaged in grading and constructing a railroad grade and railroad line on and across the Minidoka Project from the town of Burley in Cassia County, Idaho, in a southerly direction to the town of Oakley.

That said railroad line crosses public lands of the United States which have been withdrawn and

reserved from sale under the provisions of the Act of Congress of June 17, 1902, known as the Reclamation Act.

That the line of said railroad grade crosses numerous canals, ditches, and laterals of the United States already constructed under the authority of the United States and in operation on the Minidoka Project.

That said railroad line also crosses withdrawn public lands which constitute the right of way for the necessary canals and ditches to be hereafter constructed under the authority of the United States for the irrigation of other portions of said Minidoka Project, and without such additional ditches and canals, and enlargements of some of the existing canals the lands of some portions of said Minidoka Project will remain arid and unprofitable.

That many of the canals of said project have been run on a light grade in order to reach as large an area of high land as possible and that any obstruction or interference with the flow of water in said ditches or any form of bridge, siphon or crossing over the same which results in lowering the water level in said ditches, even to the extent of a few inches, will result in keeping out of cultivation and will render worthless large tracts of land which can now be irrigated from said ditches and some of which are already under cultivation by means of the water from said ditches.

That the construction of said railroad grade, embankments and cuts across the said reserved public lands will obstruct and cut off the rights of way

for future ditches and canals to be constructed by the United States for the irrigation of other portions of said project and which are necessary for the irrigation thereof, and will render it impossible to irrigate such lands without great expense in *construction* numerous siphons, bridges and crossings, and will also obstruct and impair the value of the rights of way especially reserved for ditches and canals constructed by authority of the United States under the provisions of the Act of Congress of Aug. 30, 1890.

That the Minidoka and Southwestern Railroad Company and the Utah Construction Company and their agents, employees, and officers and sub-contractors employed by them are cutting up and destroying and digging out and throwing up and converting into borrow pits and ridges portions of the irrigable agricultural lands of said Minidoka Project, the title to which is in the United States and upon which the United States depends for the return of the cost of construction of said project and which lands have been withdrawn and reserved under authority of law for the particular purpose of insuring the return of such cost of construction and compliance with the provisions of said Reclamation Act.

That by so tearing up and digging out said lands the defendants are destroying said lands and rendering them of little or no value for irrigation or agricultural purposes or for the return of the money expended by the United States to provide for the irrigation of such lands.

That the defendants are now actually engaged in so tearing up and digging out and destroying said land and are employing hundreds of men and teams and are very rapidly rushing said work to completion, and unless restrained by this Court and a temporary injunction is issued by this Court the said damage, destruction and trespass will go on to the great dama of the complainant, and it is most likely that said wrongful acts will be fully consummated before this cause can be heard on its merits.

P. M. FOGG.

Subscribed and sworn to before me this 17th day of December, 1909.

[Seal] WM. LYMAN,
Notary Public.

[Endorsed]: Filed Dec. 29, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY et al.,
Defendants.

Affidavit of L. E. Johnson.

State of Idaho,
County of Cassia,—ss.

L. E. Johnson, being first duly sworn, deposes and says:

That he is Assistant Engineer of the U. S. Reclamation Service, employed on the Minidoka Project, and as such is familiar with said project and conditions thereon.

That the Minidoka & Southwestern Railroad Company and the Utah Construction Company and their sub-contractors, agents and employees are now actually engaged in grading and constructing a railroad grade and railroad line on and across the Minidoka Project from the town of Burley, in Cassia County, Idaho, in a southerly direction to the town of Oakley.

That said railroad line crosses public lands of the United States which have been withdrawn and reserved from sale under the provisions of the Act of Congress of June 17, 1902, known as the Reclamation Act.

That the line of said railroad grade crosses numerous canals, ditches and laterals of the United States already constructed under the authority of the United States and in operation on the Minidoka Project.

That said railroad line also crosses withdrawn public lands which constitute the right of way for the necessary canals, and ditches to be hereafter

constructed under the authority of the United States for the irrigation of other portions of said Minidoka Project, and without such additional ditches and canals and enlargements of some of the existing canals the lands of some portions of said Minidoka Project will remain arid and unprofitable.

That many of the canals of said project have been run on a light grade in order to reach as large an area of high land as possible and that any obstruction or interference with the flow of water in said ditches or any form of bridge, siphon or crossing over the same which results in lowering the water level in said ditches even to the extent of a few inches will result in keeping out of cultivation and will render worthless large tracts of land which can now be irrigated from said ditches and some of which are already under cultivation by means of the water from said ditches.

That the construction of said railroad grade, embankments and cuts across the said reserved public lands will obstruct and cut off the rights of way for future ditches and canals to be constructed by the United States for the irrigation of other portions of said project and which are necessary for the irrigation thereof, and will render it impossible to irrigate such lands without great expense in *construction* numerous siphons, bridges, and crossings, and will also obstruct and impair the value of the rights of way especially reserved for ditches and canals constructed by authority of the United States under the provisions of the Act of Congress of Aug. 30, 1890.

That the Minidoka and Southwestern Railroad Company and the Utah Construction Company and their agents, employees and officers and sub-contractors employed by them are cutting up and destroying and digging out and throwing up and converting into borrow pits and ridges portions of the irrigable agricultural lands of said Minidoka Project, the title to which is in the United States and upon which the United States depends for the return of the cost of construction of said project and which lands have been withdrawn and reserved under authority of law for the particular purpose of insuring the return of such cost of construction and compliance with the provisions of said Reclamation Act.

That by so tearing up and digging out said lands the defendants are destroying said lands and rendering them of little or no value for irrigation or agricultural purposes or for the return of the money expended by the United States to provide for the irrigation of such lands.

That the defendants are now actually engaged in so tearing up and digging out and destroying said land and are employing hundreds of men and teams and are very rapidly rushing said work to completion, and unless restrained by this Court and a temporary injunction is issued by this Court the said damage, destruction and trespass will go on to the great damage of the complainant and it is most likely that said wrongful acts will be fully consummated before this cause can be heard on its merits.

L. E. JOHNSON.

Subscribed and sworn to before me this 20th day of December, 1909.

[Seal] C. H. SCHENK,
Notary Public.

[Endorsed]: Filed Dec. 29, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY et al.,
Defendants.

Affidavit of H. M. Schilling.

State of Idaho,
County of Cassia,—ss.

H. M. Schilling, being first duly sworn, deposes and says:

That he is Assistant Engineer of the U. S. Reclamation Service, employed on the Minidoka Project, and as such is familiar with said project and conditions thereon.

That the Minidoka & Southwestern Railroad Company and the Utah Construction Company and their sub-contractors, agents and employees are now actually engaged in grading and constructing a railroad grade and railroad line on and across the Minidoka Project from the town of Burley, in Cassia

County, Idaho, in a southerly direction to the town of Oakley.

That said railroad line crosses public lands of the United States which have been withdrawn and reserved from sale under the provisions of the Act of Congress of June 17, 1902, known as the Reclamation Act.

That the line of said railroad grade crosses numerous canals, ditches and laterals of the United States already constructed under the authority of the United States and in operation on the Minidoka Project.

That said railroad line also crosses withdrawn public lands which constitute the right of way for the necessary canals, and ditches to be hereafter constructed under the authority of the United States for the irrigation of other portions of said Minidoka Project, and without such additional ditches and canals and enlargements of some of the existing canals the lands of some portions of said Minidoka Project will remain arid and unprofitable.

That many of the canals of said project have been run on a light grade in order to reach as large an area of high land as possible and that any obstruction or interference with the flow of water in said ditches or any form of bridge, siphon or crossing over the same which results in lowering the water level in said ditches even to the extent of a few inches will result in keeping out of cultivation and will render worthless large tracts of land which can now be irrigated from said ditches and some of

which are already under cultivation by means of the water from said ditches.

That the construction of said railroad grade, embankments and cuts across the said reserved public lands will obstruct and cut off the rights of way for future ditches and canals to be constructed by the United States for the irrigation of other portions of said project and which are necessary for the irrigation thereof, and will render it impossible to irrigate such lands without great expense in *construction* numerous siphons, bridges and crossings, and will also obstruct and impair the value of the rights of way especially reserved for ditches and canals constructed by authority of the United States under the provisions of the Act of Congress of Aug. 30, 1890.

That the Minidoka and Southwestern Railroad Company and the Utah Construction Company and their agents, employees and officers and sub-contractors employed by them are cutting up and destroying and digging out and throwing up and converting into borrow pits and ridges portions of the irrigable agricultural lands of said Minidoka Project, the title to which is in the United States and upon which the United States depends for the return of the cost of construction of said project and which lands have been withdrawn and reserved under authority of law for the particular purpose of insuring the return of such cost of construction and compliance with the provisions of said Reclamation Act.

That by so tearing up and digging out said lands

the defendants are destroying said lands and rendering them of little or no value for irrigation or agricultural purposes or for the return of the money expended by the United States to provide for the irrigation of such lands.

That the defendants are now actually engaged in so tearing up and digging out and destroying said land and are employing hundreds of men and teams and are very rapidly rushing said work to completion, and unless restrained by this Court and a temporary injunction is issued by this Court the said damage, destruction and trespass will go on to the great damage of the complainant and it is most likely that said wrongful acts will be fully consummated before this cause can be heard on its merits.

H. M. SCHILLING.

Subscribed and sworn to before me this 24th day of December, 1909.

[Seal] S. T. LOWE,
Notary Public.

My commission expires May 17, 1913.

[Endorsed]: Filed Dec. 29, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY and THE UTAH CONSTRUCTION COMPANY,

Defendants.

Order to Appear and Show Cause.

Upon application of the complainant and upon the reading of the bill of complaint and affidavits filed in this cause, it appearing to the Court that the complainant is justly entitled to this order to appear and show cause, and that such an order is necessary and proper for the purposes of justice and for the preservation of the property in issue:

It is now hereby ordered and directed by the Court that the defendants, Minidoka & Southwestern Railroad Company and The Utah Construction Company, appear before this Court, in the courtroom in the Federal Building, in Boise, Idaho, on the seventh (7th) day of February, 1910, and show cause why an injunction should not issue and a judgment be rendered against said defendants as prayed for in the complainant's bill of complaint.

Done this 29th day of December, 1909.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Jan. 20, 1910. A. L. Richardson, Clerk.

I hereby certify that I received the within subpoena ad respondendum, together with a certified copy of the complaint, and order to show cause, at Boise, Idaho, on December 29, 1909, and that I served the same upon Minidoka & Southwestern Railroad Company by handing to and leaving with D. W. Clark, attorney for the said Minidoka & Southwestern Railroad Company, personally, a duplicate of the within subpoena ad respondendum, together with a certified copy of the complaint and copy of order to show cause, at Pocatello, Bannock County, Idaho, on January 9, 1910, the said D. W. Clark accepting service on Sunday, January 9, 1910; and I hereby further certify that I served the within subpoena ad respondendum and order to show cause upon The Utah Construction Company by handing to and leaving with I. N. Corey, the statutory agent and legal representative of the said The Utah Construction Company, personally, a duplicate of the within subpoena ad respondendum, together with a certified copy of the complaint and a copy of the order to show cause, at Rexburg, Fremont County, Idaho, on January 10, 1910.

S. L. HODGIN,
U. S. Marshal.
By E. W. Beemer,
Deputy.

Boise, Idaho, January 19, 1910.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, THE UTAH CONSTRUCTION COMPANY,
Defendants.

Affidavit of William Ashton.

State of Utah,
County of Salt Lake,—ss.

William Ashton, being first duly sworn, deposes and says: That he is now and has been for several years last past the Chief Engineer of the Oregon Short Line Railroad Company, a corporation of the State of Utah and owning and operating railroads within the State of Idaho; that the above-named defendant, the Minidoka & Southwestern Railroad Company is a corporation organized under the laws of Idaho in January, 1904, and that ever since its organization he has been and still is the Chief Engineer of said Minidoka & Southwestern Railroad Company; that it has constructed and is now operating a railroad beginning at Minidoka, a station on said Oregon Short Line Railroad situated in Lincoln County in said State of Idaho, and extending thence in a southwesterly and westerly direction to Burley, Twin Falls and Buhl, in the counties of Lincoln,

Cassia and Twin Falls in said State; that the said company filed its original articles of incorporation and due proofs of organization on February 15th, 1904, in the office of the Secretary of the Interior, and also filed in said office its amended articles, which cover and include a branch line from Burley to Oakley mentioned and set forth in the bill of complaint herein, on September 7th, 1909; that the said Secretary of the Interior accepted the original articles and due proofs of organization on the 4th day of April, 1904, and the said amended articles of incorporation on the 17th day of January, 1910; that the said branch line now under construction, extending from Burley station to Oakley, in Cassia County, Idaho, and being the construction referred to and set forth in the bill of complaint herein, traverses some portion of each of the said sections enumerated and set forth in Paragraph 4 of said complaint; that said construction of said branch line is being carried on under the supervision and direction of affiant as such Chief Engineer. Affiant further states that the lands traversed by said branch railroad within Section 20, Township 10 south, Range 23 west, Boise Meridian, mentioned in said complaint, was entered by James C. Bostetter under the Desert Land Law and final certificate therefor was issued January 26th, 1880; that all of the remaining lands so traversed by said branch line mentioned in the said bill of complaint, excepting Section 36 in Township 10 South, Range 22 East, Boise Meridian, have been filed upon by various settlers under the Homestead Act of the United States and the said lands are now

occupied and in the possession of the said homestead entrymen; that said Section 36 mentioned in said complaint was granted by the United States to the State of Idaho as school lands, and that the eastern half thereof, which is traversed by said branch line of railroad, has been sold and disposed of by the said State to private parties.

Affiant further says that the blue-print attached to the answer of the defendant, the Minidoka & Southwestern Railroad Company, to said bill of complaint was prepared under his direction and that the data shown thereon as to the several entries of lands traversed by said Oakley Branch of said railroad was obtained under his direction from the United States Land Office of the land district in which said lands are situated, and that the said data is, as affiant verily believes, in all respects accurate and correct. That by reason of said lands having been entered by the various entrymen as shown upon said print it became necessary for the said defendant railroad company to negotiate with and procure the right of way for said railroad through the said lands as filed upon and in possession of said settlers, and also to procure the right of way through said Section 36 so owned by private parties as successors to the interest of the said State of Idaho in said section; that the said print shows thereon all of the right of way acquired by deed, or by contract for such right of way, and that such right of way has at this time been procured from said settlers and owners with the exception of a small parcel at the northwest corner of the northeast quarter of the southeast quarter of said Section 36,

and across the northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of Section 30, being the land filed upon by Lorenzo W. Robbins, as shown upon said print, on May 19th, 1904, the land filed upon by Jacob T. Spencer crossed by said railroad, being the southwest quarter of the southeast quarter of said Section 19, and the land contained in the irregular parcel upon which the wye of said railroad is to be constructed at Burley station, and being that portion of the northwest quarter of the southeast quarter of said Section 19, lying south of the Minidoka & Southwestern Railroad as now constructed near the town of Burley; that as to the said tract of land last mentioned, belonging to D. E. Burley, and being included in the desert entry of said James C. Bostetter, that as to the right of way of said road through the said lands of said Burley, Jacob T. Spencer and Lorenzo W. Robbins, negotiations with them respectively to secure said right of way are now pending, and like negotiations are pending to secure right of way over the small tract of land traversed by said railroad situated in the northwest corner of the northeast quarter of the southeast quarter of said Section 36, and which belongs to A. W. Bishop as indicated upon said blue-print.

That the said railroad upon the said lands mentioned in said bill of complaint intersects and crosses three canals constructed by the United States and marked upon said blue-print as "1st Lift Canal," "2nd Lift Canal" and "3rd Lift Canal"; that in the construction of said railroad the said defendant has

not and will not interfere with said canals, or either of them, but on the contrary it is its intention to, and it will in the construction and completion of said road, bridge each of the said canals and carry the railroad over the same and in such manner as will not in any way interfere with or obstruct the flow of water in said canals to their full capacity; and the said railroad intends to and will in the future maintain its said bridges in such manner as in no wise to interfere with or obstruct the continuous flow of water in said canals to their full capacity.

The said defendant railroad company has not filed with the Secretary of the Interior a map of its line of railroad through said lands, for the reason that none of the said lands are public lands of the United States, and that no rights could be acquired by such filing.

This affiant further states that in the construction of said railroad it has not, so far as the grade thereof is concerned, and will not in the future, dig up, destroy or interfere with any of the surface of the said lands it traverses except to the extent necessary in constructing its grade, and that such digging and excavation will be wholly within the right of way heretofore procured by it, and for which it is negotiating, and will not in any respect whatever interfere with the said canals, or either of them, at the crossings of the same by said railroad, or in any wise weaken the banks of such canals or do any damage to the same or either of them whatsoever.

Affiant further says that the said defendant, the Utah Construction Company, have entered into a

contract with the said Minidoka & Southwestern Railroad Company to construct the grade of said Oakley Branch of said railroad company, and the work that has been done in said construction has been done by said construction company and in pursuance of a contract so entered into between the said defendants; and that the said Utah Construction Company is not otherwise connected with or in any way responsible for the said acts complained of, or any of them, except in pursuance of the construction of said branch line of railroad upon the line thereof adopted and within the rights of way owned as aforesaid by the said Minidoka & Southwestern Railroad Company procured by deed or contracted for as hereinbefore stated.

WM. ASHTON.

Subscribed and sworn to before me this 5th day of February, 1910.

[Seal] L. B. SWANER,
Notary Public.

[Endorsed]: Filed, Feb. 7th, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, THE UTAH CONSTRUCTION COMPANY,
Defendants.

Affidavit of Robert B. Robinson.

State of Idaho,
County of Ada,—ss.

Robert B. Robinson, being first duly sworn, upon oath deposes and says, that he is a civil engineer, and is now, and has been since the commencement of work thereon, in charge in the field of the operations in the construction of the branch line of railroad of the Minidoka & Southwestern Railroad Company extending from Burley to Oakley, in Cassia County, Idaho; that he is engaged under the general direction of William Ashton, the chief engineer of said road, and is personally familiar with the located line and the work of construction so far as the same has progressed; that he has read the affidavit of William Ashton, chief engineer of said road, filed herein, and knows the contents thereof, and that the matters and things therein set forth are true.

Affiant further says that the work of grading upon said line was begun by the defendant, The Utah Construction Company, under contract with said railroad company, on or about November 1st, 1909, and work was actively prosecuted until on or about the 11th day of December, 1909, when it was suspended on account of the severe frosts and heavy snows, and since that time no work has been done on said line; that the lands mentioned in the bill of complaint herein extend for approximately six miles, beginning at the town of Burley and extending in a southerly direction; that no grading whatever has been done

upon the first mile, beginning at said town; that on the second mile of said line from said point seventy-four per cent of the grading has been completed; on the third mile ninety-eight per cent; on the fourth mile seventy-one per cent; on the fifth mile ninety-five per cent, and on the sixth mile eighty-four per cent.

Affiant further says that in addition to the three main canals intersected by said line of railroad and mentioned in the affidavit of said William Ashton, there are intersected by said line of railroad several laterals, all of which are encountered northerly of the third lift canal mentioned in said affidavit of William Ashton; that in the work of constructing said grade it is the intention of said company, and it will provide and maintain sufficient waterways for the free flow, without obstruction or diminution, to the full capacity of every such lateral and canal encountered in the construction of said railroad, and will permanently maintain such structures.

Affiant further says that the canals designated as the first and third lift canals are larger and broader than the second lift canal so designated; that the contemplated structures for spanning said first and third lift canals are designed to have one supporting bent of piles in the center of said canal, which line of piles it is intended to place so that it will be parallel with the direction of the flow of the water in the said canals; that the said bridges will be high enough to permit the flow of water without obstruction to the full capacity of said canals, and that the erection of said line of piles in the center of the said two canals

will not have the effect of lessening the flow of the water in the said canals.

Affiant further says that, as such engineer in charge, he gave direction before grading was begun to leave an opening for each of the canals and laterals intersected, but it is a fact, as he has since ascertained, that in the course of the construction a few of the smaller laterals have been filled up along the line of the grade by the contractors, but that before the completion thereof, and in time to prevent any obstruction of the flow therein, it is the intention of the company and it will restore the said openings to their full capacity, and proper provision will be made for the continuous flow of water in all such laterals as contemplated by the constructors of said laterals, and that such restoration and provision will be made as to every such lateral prior to the commencement of the irrigation season of 1910.

Affiant further says that he has recently communicated in writing with L. E. Johnson, assistant engineer in charge of the U. S. Reclamation Service, located at Burley, requesting him to furnish definite information as to the angle of intersection of each of said canals and laterals with the said railroad which in its construction will cross such laterals and canals, with other data showing the capacity of all such waterways, for the purpose of having a mutual understanding as to the necessary openings required in each case for the transmission underneath the said railroad track of the full capacity of each of said waterways.

Affiant further says that with the provision for the

conveying across the line of said railroad of the waters intended to be conveyed by said canals and laterals all of the land on either side of said railroad will be susceptible of irrigation, and that the construction of said railroad as contemplated will not prevent the irrigation of all or any portion of the lands to be reclaimed by said project.

ROBERT B. ROBINSON.

Subscribed and sworn to before me this 7th day of February, 1910.

A. L. RICHARDSON,
Clerk.

[Endorsed]: Filed, Feb. 7th, 1910. A. L. Richardson, Clerk.

[Answer of Minidoka etc. Co.]

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants.

To the Judges of the Circuit Court of the United States in and for the District of Idaho, Central Division.

In answer to the bill of complaint on file herein, the Minidoka & Southwestern Railroad Company, a corporation, answers, denies and alleges as follows:

This defendant now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:

I.

That as to the facts and matters alleged in paragraph three of plaintiff's bill of complaint, defendant denies upon information and belief, that ninety per cent or any per cent in excess of ten per cent of the said lands under said Minidoka Project, or the proposed extension thereof, are reserved or withdrawn public lands of the United States, but defendant alleges the facts to be that only such part of said lands as are used for reservoirs, rights of way for ditches, and the other public works necessary for the successful and convenient operation of said reclamation project, are reserved or withdrawn public lands of the United States, all the remaining lands under said project being open to entry and sale under and in accordance with the provisions of sections 2289 and 2290 Revised Statutes of the United States, being the sections of the United States Statutes governing the disposal of public lands of the United States to homestead entrymen. Subject, however, to the additional requirement of the Reclamation Act.

II.

That as to the facts and matters alleged in paragraph four of complainant's bill of complaint, defendant denies that in connection with said Minidoka Project, or otherwise or at all, the Secretary of the Interior has withdrawn under the provisions of the Act of Congress of June 17, 1902, (32 Stat. 388) known as the Reclamation Act, or otherwise or at all, the said sub-divisions of land described in said paragraph four, or any part thereof, or has specially reserved said lands, or any part thereof from sale, or has not restored the same to entry or sale, but defendant alleges the facts to be that said sub-divisions of land at all times herein mentioned have been open to entry and sale in accordance with the provisions of said sections 2289 and 2290, Revised Statutes of the United States, subject, however, to the additional exactions of the Reclamation Act.

Defendant denies that Sections 19, 20, and 30 of Township Ten (10) South, Range Twenty-three (23) East of Boise Meridian, and Section 25, Township Ten (10) South, Range Twenty-two (22) East Boise Meridian, and Sections 1, 12, 11 and 14, Township Eleven (11) South, Range Twenty-two (22) East, Boise Meridian, or any or either of said sections, or any part of any or either of said sections has been specially or at all reserved from sale; and defendant denies that said land is not open to sale or entry, but defendant alleges the fact to be that the said land is open to sale and entry as hereinbefore alleged.

III.

That as to the allegations contained in paragraph

five of complainant's bill of complaint, defendant denies that it has gone upon any reserved lands of the United States either before or after the withdrawal thereof, or at all, or has laid out a line of railroad across any reserved lands from Burley in Cassia County, Idaho, in a southerly direction to Oakley in Cassia County, Idaho, or at any other place.

Defendant denies that said lands shown on the map attached to and made a part of the bill of complaint was at the time of the commencement of this action, reserved land or land withdrawn from sale.

Defendant denies that it has not obtained from the United States any right of way for a railroad across said described lands, but alleges that so far as the complainant has any right in and to said lands, or any part thereof, said Minidoka & Southwestern Railroad Company has acquired a right of way for a railroad over the same under and by virtue of, and pursuant to the Act of March 3, 1875, an act entitled, "An Act granting to railroads the right of way through the public lands of the United States, approved March 3rd, 1875."

Defendant denies that the Minidoka & Southwestern Railroad Company, or the Utah Construction Company, wrongfully or in violation of law, or in violation of the rights of the complainant, or at all, have gone upon any reserved or withdrawn public land of the United States with a large force, or any force of men, or teams, or machinery, or have let contracts for the construction of any of said or any railroad grade or any grade thereon, or at all.

IV.

For answer to paragraph six of said bill of complaint defendant denies that it has wrongfully or in violation of law, or in violation of the rights of complainant, gone upon any reserved or withdrawn public lands of the United States described in paragraph four of this bill, or any portion thereof, or any land.

Defendant denies that it has with a large or any force of men, or teams, or machinery, or at all, gone upon any reserved or withdrawn public lands of the United States as described in complainant's bill of complaint, or at all, or is constructing or threatening to construct any railroad, or railroad grade thereon, or is cutting up said lands, or any lands with numerous or other embankments, or cuts, or fills, or borrow pits, or otherwise or at all.

V.

Defendant denies that it has wrongfully or in violation of law, or in violation of any rights of the complainant, or at all, gone upon any ditches or ditch, or canals or canal, or irrigation works or work of the United States on said Minidoka Project, or rights of way therefor, or upon any rights of way, or right of way acquired for the construction of any canals or canal, or laterals or lateral, which are necessary for the irrigation of any lands located in said Minidoka Project, or at all.

Defendant denies that it is threatening or preparing to construct said or any railroad or railroad grade in any way so as to interfere with any ditches or ditch, or canals or canal, or right of way of the complainant, or any other person.

VI.

Defendant denies that it is wrongfully or in violation of law, or in violation of the rights of the complainant, cutting or digging up or destroying any proportion of any irrigable or agricultural public lands of the said Minidoka Project, or upon which the United States depends for the return of any money expended by the United States in the construction of said or any project, or in any way interfering with the United States in its purpose of furnishing water to said or any lands, except as hereinafter alleged.

Defendant denies that it is converting said or any lands, or any part thereof, into holes, or fills, or borrow pits, except as hereinafter alleged.

VII.

Defendant denies that it is utterly or at all destroying any portions or portion of said land, or greatly or at all impairing the value of any portion of said land for irrigation or agricultural purposes, or for any purpose, or for the purpose of the return to the United States of any money expended for the irrigation thereof.

Defendant denies that said lands or any of said land described in complainant's bill of complaint has been specially or at all withdrawn or withheld from sale under the authority of any law, or at all, or for the purpose of insuring the return of any cost of construction, or for full compliance with any provisions of the Act of June 17, 1902, or otherwise or at all.

VIII.

Defendant denies that by any act of this defendant,

or by the tearing up or digging out of said lands, or any part thereof, or by throwing up grades or embankments thereon, or at all, the defendant is obstructing or impairing the value of any rights of way for any future canals or ditches to be hereafter constructed under the authority of the United States, or at all, for the irrigation or reclamation of lands of the said Minidoka Project, or any other lands or at all.

IX.

Defendant denies that any rights of way for canals or ditches either present or future have for more than nineteen (19) years last past, or for any other period of time, or at all, been withdrawn or reserved from sale by the United States under the provisions of the Act of Congress of August 30, 1899 (26 Stat. at Large, 319), or otherwise or at all, or under the provisions of the section of said United States statute set out in paragraph seven of complainant's bill of complaint.

X.

That as to the allegations contained in paragraph eight of complainant's bill of complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer the same, and placing its denial upon that ground it denies that the grades of any canals or ditches of the Minidoka Project which this defendant is threatening to cross, or is crossing with its said or any railroad, or railroad grade, are very light; and upon the same ground defendant denies that any obstruction or interference with the flow of the water in said canals or ditches, or any loss in

surface elevation of water in said ditches will result in throwing out of cultivation large or any tracts of land which can be, or are now being irrigated from said ditches, or will render said or any tracts of land desert, or will cause the United States or any of the settlers on said tracts of land, or any of them, great or irreparable or any injury.

XI.

Defendant denies that said or any railroad, or railroad grade will obstruct or cut off any rights of way required for additional canals or laterals, or will obstruct or cut off any enlargements of existing canals or laterals where they are necessary for the irrigation or reclamation of any arid lands in any portion of said Minidoka Project, or render it impossible to irrigate or reclaim said lands or any part thereof without numerous or expensive syphons or bridges, or at all; defendant denies that said railroad or any railroad grade will obstruct or cut off any rights of way or canals or laterals, or ditches of the complainant, or cause the complainant great or irreparable or any injury.

XII.

Defendant denies that it is cutting up any reserved public lands of the United States, or that by any of its acts in cutting up any of the lands described in complainant's bill of complaint, into cuts, or embankments, or borrow pits, the complainant will suffer great or irreparable damage, or any damage at all.

XIII.

Defendant denies that by reason of any unlawful acts or any acts or act of the defendants, or either

of them, complainant has been damaged to the extent of Fifty Thousand ($50,000.00) Dollars, or any other sum or amount at all.

XIV.

Defendant denies that complainant has no specific or adequate or complete remedy at law, and denies that it is now engaged in any trespasses or wrongful acts as alleged or at all, or that it is rushing said work to completion, except as hereinafter alleged.

XV.

Defendant denies that unless a temporary restraining order is granted at once, or at all, any wrongful acts of the defendants or either of them; will be fully or at all consummated, or that complainant will suffer any irreparable or other injury.

XVI.

For further answer to complainant's bill of complaint, and by way of defense thereto, this defendant alleges:

I.

That the defendant, the Minidoka & Southwestern Railroad Company is a corporation duly organized and existing under and by virtue of and pursuant to the laws of the State of Idaho, with its principal place of business at the city of Pocatello, Bannock County, Idaho, the object and purpose of its organization being to construct, own and maintain a railroad and operate the same by steam or other motive power, with such branch lines and extensions as may from time to time be deemed desirable and expedient, and as may be authorized by law. Said railroad as now constructed begins at the station of Minidoka in

Lincoln County, Idaho, and extends in a general southwesterly direction passing through the town of Burley to the town of Buhl, in Twin Falls County, Idaho, said Minidoka & Southwestern Railroad Company is further authorized and empowered under its articles of incorporation, to construct, maintain and operate a line of railroad beginning at a point near Burley station in Cassia County, Idaho, and extending thence in a southerly direction through Cassia County to Oakley, in said Cassia County, Idaho.

II.

That the defendant, The Utah Construction Company is a corporation organized and existing under and by virtue of the laws of the State of Utah, and doing business within the State of Idaho, and as such corporation is engaged in a general contracting business, and as such contractors and not otherwise, are engaged under the direction of the said Minidoka & Southwestern Railroad Company in constructing upon the right of way hereinafter described owned by said Minidoka & Southwestern Railroad Company, a grade upon which to lay a railroad track to be used by said Minidoka & Southwestern Railroad Company in the operation of trains between said station of Burley and said station of Oakley.

III.

That prior to the commencement of this action, and prior to the commencement of the construction of said railroad, and railroad grade, leading from Burley to Oakley, the said Minidoka & Southwestern Railroad Company fully and duly complied with the constitution and laws of the State of Idaho relating

to the organization, existence and management of railroad corporations, and of the right and authority of such corporations to acquire and hold rights of way and other property necessary for the construction and operation of railroads.

IV.

That said Minidoka & Southwestern Railroad Company has constructed and now owns a steam railroad, which said road is operated by the Oregon Short Line Railroad Company for the carriage and transportation of passengers and freight and United States mail from Minidoka, Idaho, to Buhl, in Twin Falls County, Idaho, and said Minidoka & Southwestern Railroad Company desires to maintain and operate a steam railroad for the carriage and transportation of passengers and freight and United States mail in connection with and as a part of the line of railroad now maintained and operated as aforesaid, said road to extend from Burley, Cassia County, Idaho, in a southerly direction through said Cassia County to Oakley in said county and State.

V.

That said defendant, Minidoka & Southwestern Railroad Company, has already received proper conveyances of title to practically all of the right of way which it needs for said railroad from Burley to Oakley, and is now engaged in constructing on right of way, a railroad grade, embankment and track to be used as aforesaid, said right of way upon which said railroad is being constructed being located as shown upon the blue-print map hereto attached and marked Exhibit "A."

VI.

That prior to the commencement of this action, and prior to the commencement of the construction of said railroad, said Minidoka & Southwestern Railroad Company filed with the Secretary of the Interior, a copy of its articles of incorporation, and due proof of its organization under the same, which were accepted and approved by the Honorable Secretary of the Interior, and which are, as defendants are informed and believes, and therefore allege, still on file with the Secretary of the Interior.

VII.

That said Minidoka & Southwestern Railroad Company has surveyed the definite line of its proposed railroad over each of the tracts of land described in the complainant's bill of complaint in the manner customary in surveying and marking lands for lines of railroad, and has caused a map to be prepared of said right of way showing the general route of said road where the same passes over the lands described in complainant's bill of complaint; said survey and map having been made long prior to the commencement of this action. A blue-print of said map where the same passes over said land, marked Exhibit "A," is hereto attached and made a part hereof, and said route as shown upon said map was duly and regularly adopted prior to the commencement of this action, by said Minidoka & Southwestern Railroad Company, and it is upon said route as so surveyed and adopted where the same passes over said described lands, that these defendants were at the time of the commencement of this action, and

still are engaged in constructing a railroad track and roadbed, and it is the construction of said railroad at said place which the complainant in this action seeks to enjoin.

VIII.

That the defendant herein, Minidoka & Southwestern Railroad Company, is now and was prior to the commencement of this action, pursuant to law, and in furtherance of its purpose aforesaid to construct, own and operate a line of railroad from Burley to Oakley, engaged in constructing a railroad grade, and in constructing its railroad over the lands described in complainant's bill of complaint as shown by the blue-print map attached hereto; and prior to the commencement of this action, and prior to the commencement of the work of constructing said railroad as herein alleged, all of said lands described in complainant's bill of complaint over which said Minidoka & Southwestern Railroad Company's line of road extends, and is being constructed as aforesaid, and all of the land claimed by it for a right of way for such railroad, was segregated from the public domain and filed upon by homestead entrymen under and by virtue of and pusuant to, and in accordance with the provisions of the United States statutes governing homestead entries, subject to the additional exactions of the reclamation act mentioned in complainant's bill of complaint, said lands all being situated within the boundary lines of said Minidoka Irrigation Project as designated by the Secretary of the Interior, and the defendant, the Minidoka & Southwestern Railroad company, has

obtained by contract from practically all of the homestead entrymen over whose entries said railroad is being constructed, the right to construct its said railroad over and across said lands, at the place shown on the blue-print map hereto attached, the right of way so granted being ———————— feet wide, and said defendant, The Minidoka & Southwestern Railroad Company is now engaged in acquiring rights from those entrymen from whom such rights have not yet been secured, and it is upon this right of way so obtained, and not elsewhere, that the Minidoka & Southwestern Railroad Company is constructing the railroad described in the complainant's bill of complaint, and which the complainant in this action seeks to enjoin.

X.

Defendant further alleges according to its information and belief, that at the time of the commencement of the construction of said railroad, and at the present time, no part of said right of way where it crosses the said described lands, was or is occupied by the United States of America by having laid out or constructed thereon irrigation ditches, ways or works; and further in that regard defendant alleges that it is not necessary for complainant to have, in order to properly construct and maintain and operate its said reclamation project, said proposed right of way claimed by the defendant, the Minidoka & Southwestern Railroad Company, or any part thereof, but said complainant without appreciable inconvenience can construct any necessary canals or irrigation ways or works for the irrigation of said

lands, on lands adjacent to said right of way, and in such a way as not to interfere or conflict with the rights of the defendant, the Minidoka & Southwestern Railroad Company in and to said right of way.

Wherefore this defendant having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of complaint material to be answered according to its best knowledge and belief, humbly prays this Honorable Court to enter its decree that this defendant be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY,

By P. L. WILLIAMS,
General Atty.,
Respondent.

P. L. WILLIAMS,
D. WORTH CLARK,
Solicitors for Respondents.

Residence and P. O. Address of D. Worth Clark, Pocatello, Idaho.

State of Idaho,
County of Bannock,—ss.

W. H. Jones being first duly sworn deposes and says that he is a director of the Minidoka & Southwestern Railroad Company, one of the respondents above named, and is the only officer of said defendant company residing in the State of Idaho; that he

has read the above and foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to on information or belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this —— day of February, 1910.

I hereby certify that the foregoing answer is in my opinion well founded in point of law.

Dated this 7 day of February, 1910.

D. WORTH CLARK,
Of Counsel for Respondent.

[Endorsed]: Filed, February 7th, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY and THE UTAH CONSTRUCTION COMPANY,
Defendants.

Separate Answer of The Utah Construction Company.

The defendant, The Utah Construction Company, for separate answer to the bill of complaint of the complainant herein, says:

1st. That it is a corporation organized and existing under the laws of the State of Utah, and engaged in the business of building and constructing railroads and other similar work.

2nd. This defendant has not any knowledge, information or belief as to whether the lands mentioned in said bill of complaint or any of them have lawfully or at all been withdrawn by the complainant, as alleged in its bill of complaint, and for that reason cannot answer thereto.

3rd. That heretofore and prior to the commencement of this suit it entered into a contract with the defendant, Minidoka & Southwestern Railroad Company, whereby it agreed to construct for said railroad company the roadbed for a railroad over the lands mentioned in said bill of complaint upon the line indicated on the map attached to said bill of complaint, under the direction and supervision of said railroad company.

4th. That under and by virtue of said contract and by the direction of said railroad company, and not otherwise, this defendant entered upon the lands in question for the purpose of constructing the roadbed for a railroad over said lands as aforesaid, as it believed it had the right to do.

5th. This defendant denies that any such entry on said lands for the purpose aforesaid was wrongful or in violation of law or in violation of the rights of the complainant, and denies that any of the acts alleged in paragraphs 5, 6, 7 and 7½ of said bill of complaint to have been done by it were wrongful or

in violation of law or of the rights of the complainant.

ANDREW HOWAT and
H. R. MACMILLAN,
Solicitors for the Defendant, The Utah Construction Company.

[Endorsed]: Filed Feb. 7, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

IN EQUITY—No. ——.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants.

Replication [Filed February 7, 1910].

This replicant saving and reserving to himself all and any manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto, saith, that he doth and will ever maintain and prove his said bill to be true and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law, to be replied unto by this repliant;

without that, that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

C. H. LINGENFELTER,
U. S. Attorney for the District of Idaho, Boise, Idaho.

B. E. STOUTEMYER,
Attorney, U. S. R. S., Boise, Idaho.

I admit receipt of a copy of the above this 7th day of Feb., 1910.

P. L. WILLIAMS,
D. WORTH CLARK,
Solicitors for Above Defendants.

[Endorsed]: Filed, Feb. 7, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation) and THE UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants.

Affidavit of B. E. Stoutemyer.

County of Ada,
State of Idaho,—ss.

B. E. Stoutemyer, being first duly sworn deposes and says that the copy of the telegram attached hereto and marked Exhibit "A" is an exact copy of the telegram sent by him to the Director of the United States Reclamation Service on February 7th, 1910, in regard to the status of the articles, profiles and maps of the Minidoka & Southwestern Railroad Company before the Department and that the telegram attached hereto and marked Exhibit "B" is the original telegram received on February 8th, 1910, in reply to the telegram marked Exhibit "A."

B. E. STOUTEMYER.

Subscribed and sworn to before me this 8th day of Feb., 1910.

[Seal] EMMA JACOBSON,
Notary Public.

Exhibit "A."

Gov't Paid.

Boise, Idaho, Feb. 7, 1910.

Director Reclamation Service,
Washington, D. C.

Chief Engineer Minidoka Southwestern Railroad filed affidavit that Secretary Interior accepted company's amended articles including Burley Oakley Line January seventeenth. Have wire sent us today whether true also as to profile or map Hearing to-

morrow morning on injunction.

STOUTEMYER.

Exhibit "B."

Paid Night, Gov't.

Washington D. C. Feb. 7th, 1910.

Stoutemyer.

Reclamation, Boise, Idaho.

Your telegram seventh Amended articles Minidoka Southwestern approved by Secretary January seventeenth but apparently do not include line Burley to Oakley. Approval of articles only preliminary to grant of right of way which only became effective upon approval of a map or upon construction.

NEWELL.

[Endorsed]: Filed Feb. 8, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY, (a Corporation),

Defendants.

Affidavit of F. E. Weymouth.

County of Ada,
State of Idaho,—ss.

F. E. Weymouth, being first duly sworn deposes and says that he is now and for more than a year last past has been the Supervising Engineer of the United States Reclamation Service in the State of Idaho and as such is in charge of all of the work of the Reclamation Service in the State of Idaho, including the Minidoka Project. That he is familiar with said Minidoka Project and that section of said Minidoka Project which is known as the South Side Minidoka Pumping Project.

That the lands described in the complainant's bill of complaint herein as the lands which are being crossed by the defendant's said railroad line from Burley to Oakley, Idaho, to wit:

Sections 19, 20 and 30 of Twp. 10 S., Range 23 East, B. M. and Section 25, Twp. 10 S., Range 22 East, B. M., and Sections 1, 11, 12, and 14, Twp. 11 S., Range 22 East, B. M., are a part of that section of said Minidoka Project which is known as the South Side Minidoka Pumping Project.

That the Secretary of the Interior has not yet issued the public notice provided for in section four (4) of the Reclamation Act of June 17, 1902, for said South Side Minidoka Pumping Project nor any part thereof neither has he announced the charges which shall be made per acre upon the entries nor the number of annual installments.

That said lands have been withdrawn from entry by the Secretary of the Interior under the second form of withdrawal authorized by section three (3) of said Reclamation Act, a certified copy of which order of withdrawal is hereto attached and made a part of this affidavit, and that said withdrawn lands have not been restored to entry. That said lands have been entered since withdrawal by various homestead entrymen under the provisions of the Homestead Law, subject to all the conditions, provisions and restrictions of said Reclamation Act of June 17, 1902, but that said entrymen have not yet paid any part or installment of the charges which shall be made per acre upon said entries under the provisions of section four (4) of said Reclamation Act nor have they completed the residence and cultivation required by the Reclamation and Homestead Acts.

F. E. WEYMOUTH.

Subscribed and sworn to before me this 8th day of February, 1910.

[Seal] EMMA JACOBSON,
Notary Public.

DEPARTMENT OF THE INTERIOR.
UNITED STATES LAND OFFICE,
Hailey, Idaho, January 11, 1910.

Mr. F. E. Weymouth,
Supervising Engineer,
Boise, Idaho.

Sir: We are in receipt of your letter of the 27th ult., file 216–A, BES–FH, requesting us to send you certified copies of the orders of withdrawal covering the lands in the South Side Minidoka Project in

Cassia Co., on the South Side of Snake River, and in reply, we enclose herewith copy of letter from Assistant Commissioner W. A. Richards, under date of November 20, 1902, giving the data requested.

Very respectfully,
A. I. McMAHON,
Register.
FRED W. BRADLEY,
Receiver.

AIM—ow

A. W. B. C. L. D. B.

DEPARTMENT OF THE INTERIOR.

UNITED STATES LAND OFFICE.

191108–1902

Washington, D. C., November 20, 1902.

Subject: Withdrawal for Irrigation Plans.

Register and Receiver,
U. S. Land Office,
Hailey, Idaho.

Sirs: The Secretary of the Interior, by his order dated November 17, 1902, has directed that the lands in the following named townships be withdrawn temporarily from entry, except under the homestead laws, provided that all lands entered and entries made under the homestead laws within the areas hereby withdrawn, during such withdrawal, shall be subject to all the provisions, limitations, charges, terms and conditions of the Act of June 17, 1902.

Ts. 8 S., Rs. 24 to 29 E., inclusive, B. M.
" 9 " " 19 to 29 " " " "
" 10 " " 19 to 28 " " " "
" 11 " " 19 to 25 " " " "

You will therefore make the proper entries on your records and acknowledge receipt.

Very respectfully,

(Signed) W. A. RICHARDS,
Assistant Commissioner.

DEPARTMENT OF THE INTERIOR.
UNITED STATES LAND OFFICE.

We hereby certify that the fore-going is a true and correct copy of letter "E", dated November 20, 1902, of the Assistant Commissioner of the General Land Office, as the same appears on file in this office.

WITNESS my hand this 12th day of January, 1910.

A. I. McMAHON
Register.

[Endorsed]: Filed Feb. 8, 1910, A. L. Richardson, Clerk.

Journal Entry.

At a stated term of the Circuit Court of the United States for the District of Idaho, held at Boise, Idaho, on Tuesday, the 8th day of February, 1910. Present, Hon. FRANK S. DIETRICH, Judge.

[Order of Submission.]

No. 71.

THE UNITED STATES

vs.

MINIDOKA & SOUTHWESTERN RAILROAD CO. et al.

On this day this cause came on to be heard upon

the order to show cause why an injunction should not be issued herein. C. H. Lingenfelter, U. S. District Attorney, and B. E. Stoutemyer, Atty. for the Reclamation Service appearing as counsel on behalf of plaintiff, and P. L. Williams and D. Worth Clark, Esqs., appearing as counsel on behalf of defendants, and after argument by the respective counsel said matter was submitted and taken under advisement by the Court.

In the Circuit Court of the United States in and for the Central Division of the District of Idaho.

Dated February 8, 1910.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, and THE UTAH CONSTRUCTION COMPANY,
Defendants.

Opinion on Application for Temporary Injunction.

C. H. LINGENFELTER, U. S. Attorney, and
B. E. STOUTEMYER,
Attorneys for Complainant,
P. L. WILLIAMS and D. WORTH CLARK,
Attorneys for Defendants.

DISTRICH, District Judge.—This is an application for a temporary injunction, restraining the defendant from completing the construction of its railroad across certain lands and canals embraced in the Minidoka Reclamation Project, in Cassia County,

Idaho. The substantial facts are not in dispute, and the questions of law arise upon the construction and application of the general Railroad Right of Way Act, of March 3, 1875 (18 Stat. L. 482), granting to railroad corporations rights of way through "the public lands of the United States"; a paragraph of the general Appropriation Act, approved August 30, 1890 (26 Stat. L. 391), providing:

> "That in all patents for lands hereinafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States";

an act amending section 2288 of the Revised Statutes of the United States, approved March 3, 1905 (33 Stat. L. 991), which is as follows:

> "Any *bona fide* settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim";

and the Reclamation Act, approved June 17, 1902 (32 Stat. L. 388).

The Reclamation Act, appropriating for the irri-

gation of arid lands in certain states and territories, the proceeds of the sales of public lands situate therein, directs the Secretary of the Interior to cause examinations and surveys to be made for the purpose of determining the feasibility of any given project, and authorize him to "withdraw from public entry the lands required for any irrigation works contemplated" under its provisions; and it further authorizes him, "at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works." It is also provided that public lands which it is proposed to irrigate "shall be subject to entry only under the provisions of the homestead laws, in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms and conditions" in the act prescribed. These terms and limitations are, that the Secretary of the Interior may confine the entry of any one person to such an area, not less than forty nor more than one hundred and sixty acres, as in his opinion may be reasonably required for the support of a family; that the commutation provisions of the general homestead laws shall not apply; that the entryman shall pay, in the manner and at the times prescribed by the Secretary of the Interior, a ratable proportion of the cost of the irrigation works; and that he shall pay the charges for construction of the irrigation works apportioned against his tract, and reclaim at least one-half of the total irrigable area of his entry for

agricultural purposes, before receiving patent.

It will be observed that the act provides for two different "withdrawals" or "reservations," to be made by the Secretary of the Interior. As is said in United States vs. Hansen, 167 Fed. 881: "It provides, first, that the Secretary may withdraw from public entry such lands as are required for the actual occupation of the reclamation service. This is for such purposes as reservoirs, canals, pumping works, etc. No exception whatever is expressed as to the lands which are to be withdrawn for these purposes. It provides, second, for the withdrawal of any other public lands 'believed to be susceptible of irrigation from said works.' Such lands are to be withdrawn from entry, 'except under the homestead laws.' "

Briefly, and omitting the recital of dates and details, the facts are that prior to the organization of the defendant railroad company the Secretary of the Interior, acting under authority of the Reclamation Act, established the Minidoka Project, and entered upon the construction of the works for the irrigation of the lands embraced therein. Certain lands were withdrawn or reserved for the use of the Government, for its dams, pumping plant, canals, and other structures; but none of the lands so reserved are here involved. There were also withdrawn from entry, "except under the homestead laws," other public lands, aggregating a large area, "believed to be susceptible of irrigation" from the contemplated works. Soon thereafter all the lands of the latter class were entered by qualified persons under the provisions of the general homestead law,

modified and limited, as hereinbefore stated, by the Reclamation Act. These entries were made at various dates, some of them several years prior to the commencement of this action, but none of them have as yet progressed to final proof or patent. The defendant railroad company projected a branch road, connecting with an existing line at the town of Burley, and traversing in its course for a distance of approximately six miles lands thus covered by homestead entries, and in the possession of the several entrymen; and also intersecting three of the Project canals, constructed and controlled by the Reclamation Service. Apparently for the purpose of claiming some benefit under the Railroad Right of Way Act of March 3, 1875, prior to the commencement of this suit and after the definite location of its line of road, the railroad company filed with the Secretary of the Interior a copy of its articles of incorporation and proofs of its organization under the same; it has not, however, filed any profile map with the register of the local land office. Recognizing the possession and rights of the homestead entrymen, the defendant, before it commenced to grade its roadbed, much work upon which has now been done, negotiated with the entrymen, and, by purchase, secured from them, so far as lay within their power to grant, the desired right of way. There are two or three entrymen with whom negotiations are still pending, but that fact is unimportant, for the entrymen are not complaining and the defendant fully concedes the necessity of extinguishing their claims, either by purchase or by proceedings in eminent domain. There has been no

interference by the defendant with the complainant's canals, and there is a disavowal of any purpose or intent to make or to claim the right to make any crossing which will diminish their capacity or impair their safety, or materially restrict the complainant's management and control thereof.

From this brief statement, it is apparent that complainant's application for injunctive relief rests upon two classes of property rights which, it is alleged, the defendant is threatening to invade; its interest in the lands which are in the possession of the several entrymen, but to which it holds the legal title, and its rights in the canals which it has constructed across these lands, and of which it has the exclusive possession. First, as to the lands.

At the argument there was considerable discussion touching the question whether or not lands withdrawn under the Reclamation Act from entry, "except under the homestead laws," are subject to the operation of the Railroad Right of Way Act of March 3, 1875, the plaintiff affirming and the defendant denying that such lands are within the exception of section 5, which provides that the act shall not apply to "lands especially reserved from sale." But the question does not seem to be pertinent at the present juncture, for whatever may be the legal status of the lands so withdrawn under the Reclamation Act, after withdrawal and prior to entry, all of the lands here involved rest under valid subsisting homestead filings, and being, therefore, no longer "public lands," they are exempt from the operation of the Right of Way Act, which, by its express terms,

is made applicable only to "public lands of the United States." (Bardon vs. Northern Pacific Railroad Co., 145 U. S. 535.) And whether we take the one view or the other of the ensuing rights of the parties, when and in the contingency that a present entryman shall forfeit or abandon his entry covering lands traversed by the defendant's railroad, the anticipation of such a possible occurrence furnishes no substantial basis for present injunctive relief. In either view the rights of the railroad company upon the happening of such a contingency would be measured by the law; they will not be enlarged by the possession of the railroad company, however long continued, for, as against the Government, neither acquiescence nor lapse of time may be pleaded in bar. It follows that if the Right of Way Act does not become applicable upon the cancellation of an existing entry, and if the railroad company holds under no other pertinent provision of law, the plaintiff may, as soon as the land is released from entry, without prejudice assert all the rights of an owner against one who, without right, holds possession of its property. If, upon the other hand, the Right of Way Act will, in such a contingency, operate to effect a grant of the right of way to the defendant, a court of equity, without other reason for so doing, cannot at this time properly enjoin the defendant from putting itself in a position where it may, without wrongdoing, secure the benefits of a valid law.

The primary inquiry, therefore, relates to the present, rather than the future rights of the several parties in interest—such rights as are created and

defined by the acts hereinbefore referred to, exclusive of the Railroad Right of Way Act. I say the several parties in interest, because while the controversy is, in form, between the Government and the railroad company, its adjudication necessarily involves a consideration of the rights of the homestead settlers, who have entered the lands and assumed certain obligations, and who, in turn, are entitled to receive such reciprocal benefits and to exercise such valuable privileges as are provided for by law. And, as will presently appear, between an entry subject to legal limitations, such as are implied by the complainant's contention, and an entry measuring up to the defendant's view of the law, there is a distinction which the entryman may not unreasonably regard as highly material.

The original homestead law was enacted for the purpose of encouraging settlement upon the public domain, the essential conditions to the acquisition of title being that the entryman should make his home upon the land, and improve and cultivate it. Right of possession and the duty of occupation follow the initiation of the entry, and from that time until the title is fully earned, the entryman may make such uses of the land as are within the spirit and general purpose of the homestead law, all the time with due regard to the rights of the Government, still the owner of the principal estate. The entryman may not commit waste or use the resources of the land except in so far as may be reasonably necessary to effect the lawful object of his possession, nor may he occupy the land or permit its occupancy for a pur-

pose inconsistent with the general purpose of tillage and home making. By strict requirement, the entry can be made only for the use and benefit of the entryman, and is nontransferable; nor may any part of the entry be alienated, either by voluntary contract or by judicial sale. It follows that under the law as originally enacted the entryman could not legally use or permit another to use any part of his entry for railroad purposes, nor could he make a conveyance for such purpose. The practical necessity for making certain exceptions to these rigid restrictions upon the power of the entryman must have soon become apparent, and was doubtless brought to the attention of Congress, for we find that by the act of March 3, 1873 (R. S. U. S. 2288), the entryman was authorized to transfer by warranty against his own acts any portion of his entry, for church, cemetery or school purposes, and for the right of way of railroads, all of which, as appears from the statute, were deemed to be "public purposes"; and later, by the amendatory act of March 3, 1895, authority to transfer was extended to rights of way for telegraph and telephone lines, and for irrigation canals and reservoirs, which are also declared to be public purposes. And if we will but for a moment contemplate the plight of a community made up of settlers upon public lands entered under the homestead laws, where no one has the power to convey or to acquire a site for a schoolhouse or a church or a cemetery, or a right of way for a railroad or a telegraph or telephone line, or, in an arid region, for an irrigating ditch, both the reasons for this legislation and the

objects and purposes thereof will clearly appear.

By its express terms the act confers upon "any *bona fide* settler under the pre-emption, homestead or other settlement law," the right to transfer for a railroad right of way, and while its application to an entry under the homestead law, as modified by the Reclamation Act, is here apparently denied by the Government, no good reason is offered, and, as I view it, no substantial reason can be brought forward for refusing such an entryman the benefit thereof. In terms the act is all inclusive, for even were the suggestion of counsel for the Government to be adopted, that the entries under consideration are not, strictly speaking, to be deemed homestead entries, we still have the express provision that "any *bona fide* settler under . . . . . (any) other settlement law; may make a transfer; and this declaration is, beyond all peradventure, broad enough to include the entrymen of the lands in question. Moreover, if by reason of any ambiguity the language of the act were subject to construction, no reason is to be found in the general policies of the Government, or in the scope and purpose of the Reclamation Act, for narrowly construing this law, to the exclusion of entries within reclamation projects. The purpose of the Reclamation Act is identical with that of the original Homestead Act; it is but an adaptation of the original act to conditions not in contemplation at the time of the earlier legislation. It encourages and makes possible the settlement and tillage of large tracts of public lands, and, to say the least, it is quite as important that settlers upon such

is simply authorized to execute a worthless instrument, for the grantee could not obtain any benefits thereunder without first entinguishing the rights and divesting the title of the Government, conditions with which it is admittedly impossible to comply. The entryman could convey a site for a schoolhouse, but actual use of such site for school purposes would constitute a trespass against the United States; and settlers might convey a right of way for a railroad, but it would be unlawful for the grantee to construct a roadbed and lay a railroad track thereon. Is it to be supposed that Congress intended thus to 'keep the word of promise to the ear and break it to the hope'? The law must receive a sensible construction, to the end that its underlying purpose may be given practical effect and its general objects accomplished. As has already been stated, this legislation was first enacted in 1873; and soon thereafter, in 1875, Congress passed the general Right of Way Act, providing for the acquisition of rights of way across public lands and over possessory claims upon public lands. Appreciating the desirability, if not the necessity, of having railroads penetrate and traverse the public domain upon which settlement was being encouraged, Congress doubtless purposed, by these acts, to make ample provision for the acquisition of rights of way across all lands (excepting those reserved for special purposes) in which it had any interest and which would be encountered in making the desired extensions of railroad lines. It is reasonable to assume that the two acts were deemed to be sufficient to accomplish this purpose. By the

lands, as that settlers upon lands more easily reclaimed and improved, have schools, churches, cemeteries, telephones, telegraphs and convenient means of transportation. Yet it was practically conceded at the argument by counsel for the Government that if the settlers here cannot, by their consent, authorize the construction of a railroad across their several entries, then there is no way provided by law by which such right may be granted, for if, as is contended on behalf of the Government, and as is here held, the general Right of Way Act of March 3, 1875, is not applicable under the existing conditions, and if the act now under consideration is likewise inapplicable, then, as far as I am advised, there is no law either granting a right of way or vesting in any officer or department the authority or discretion to make a grant of such a right of way, or legally to consent to occupancy for such purpose. And it follows that if the settlers have not the power to grant such right of way for railroad purposes, neither have they the power to convey sites for schoolhouses or churches or cemeteries, or rights of way for ditches or for telegraph or telephone lines.

If then, as I think must be held, the entrymen here are entitled to the full benefit of this legislation, it is proper next to consider the nature and effect of an authorized conveyance for one of the public purposes specified in the law. It is, of course, possible so literally to construe the law as to confine the operation of the conveyance therein provided for, strictly to the entryman's estate. Such a construction would, however, necessarily imply that the entryman

act of March 3, 1875, it expressed its willingness freely to grant such rights of way over lands where the Government was the owner of the entire interest, and there is no reasonable ground to suppose that it was unwilling to grant similar rights of way over lands in which the interest of the Government was limited. And it is further to be remarked that if, at the time of the passage of the act of 1875, it was understood that the act of 1873, together with conveyances made in pursuance thereof, was insufficient to authorize the grantee to occupy and use the right of way for the purposes specified in the grant, it is strange that Congress, while granting, without charge, rights of way over lands which were exclusively public, did not also include lands similarly situated, in which the public had only a reversionary interest. From these considerations, the conclusion is unavoidable that, subject to the entryman's conveyance, the act of 1873, if it does not operate as a grant of the Government's interest, at least authorizes occupancy and use for the purposes specified in the conveyance, during the life of the entry. What rights the railroad company may have in case its grantor, an entryman, abandons his entry, need not at this time be determined; that may be a matter of future concern to the defendant, but it is of no present interest to the plaintiff. For if we adopt the view least favorable to it, and hold that it is not a grantee, but only a licensee, still as a licensee merely, the defendant's present occupancy and use are fully authorized by law, and the plaintiff's contention that it is a trespasser must therefore fail.

It is suggested that if this view prevails it will be entirely possible for an entryman to impair the security of the Government for the repayment to it of the cost of the irrigation works, by granting rights of way to such an extent that the land will be rendered valueless for agricultural purposes. But such a peril is more fanciful than real; the danger from a possible epidemic of competitive railroad building may, it is thought, be treated as a negligible consideration, and as for a road or two, as was said by the Supreme Court in Railroad Company vs. Baldwin, 103 U. S. 426, the "lands would not be less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby."

It is further suggested that in carrying to completion its projected irrigation system, the Government may in the future reasonably require rights of way for ditches, in addition to those now occupied by existing canals, and that these lands, being west of the one hundredth meridian, are subject to the reservation in the act of August 30, 1890, the material provision in which is hereinbefore set forth, requiring that there be expressed in patents for lands lying west of the one hundredth meridian a reservation of rights of way for ditches and canals "constructed by authority of the United States." But the rights of the United States by virtue of this provision are no greater before than after patent, and it may well be doubted whether the contention would be made that a railroad company holding a deed from the patentee, for a right of way across lands the patent to

which contains such a reservation, should, at the instance of the Government, and solely because of such reserved easement, be enjoined from using its right of way. Assuming the correctness of the construction heretofore placed upon the law by this court, in Green vs. Willhite (October 31, 1906), and by the Supreme Court of Idaho, in Green vs. Willhite, 14 Idaho, 238, it does not follow that because of the reservation in favor of the Government, the patentee and his grantee must refrain from occupying or using the land, pending the selection and location by the Government of needful rights of way. The reservation is sufficiently onerous if it be limited to the purposes for which it was intended, and those purposes require only that the absolute possession and dominion of the owner yield to the needs of the Government when and to the extent that they actually arise; there is no reason why in the meantime the land should lie idle or that either the entryman or his grantee should be prohibited from making any legitimate use thereof. It is, of course, assumed that the reservation loses none of its force by reason of a transfer by the entryman or patentee, and that being the case, is there any more reason for enjoining the defendant from laying its track across the land than for restraining the entryman from building his fences or planting his crops, or digging his ditches? In either case, unless some other statute intervenes, the superior rights of the Government by reason of the reservation, must, as the public needs arise, necessarily prevail; and the peril of occupancy for railroad purposes would therefore appear to be to

the defendant rather than to the plaintiff.

Passing to the second branch of the case, the crossing of the plaintiff's canals, it is found that the controversy involves not so much the general principles of law by which the rights and obligations of the parties are to be measured, as the practical application of these principles to the particular facts. The Government having rightfully located and constructed its canals, is, like any other proprietor, entitled to be protected against any unlawful interference with their maintenance and use; and this general right the defendant in terms concedes. Upon the other hand, it is taken for granted that the Secretary of the Interior, at whose instance presumably the suit was commenced, is actuated only by the motives of a fair-minded and prudent owner, and is seeking, not to obstruct the building of the railroad, but only to be protected against loss and peril by reason of its construction. In a large sense, the Secretary of the Interior, in building and operating these canals, acts as the trustee for the settlers, upon whom, primarily, rests the burden of their cost, and into whose hands their control will ultimately pass; and it will therefore be assumed that he desires to encourage and not to impede the execution of a work which, admittedly, is of general interest, and will be of general benefit to the entrymen, provided that and so long as the work is carried forward in such manner as not to injure or imperil the project and property which it is his specific duty to protect. These canals extend through the country at great length, and obviously intolerable inconvenience would be en-

tailed not only upon the entrymen whose lands are crossed, but upon the public at large, if bridges should be denied for the passage of ways either public or private. Such crossings, whether of wagon roads or of railroads, should, of course, be made without expense or loss to the owner of the canals, and in such manner as not to impair or imperil their efficiency, or increase the burden of their maintenance. The precautions for safety should doubtless be taken with a full appreciation of the irreparable loss which may ensue upon the occurrence of a break in the banks of a large canal, especially when such break happens during the height of the irrigating season; and in case of a railroad crossing there is the additional important consideration of the peril to life and property in case the roadbed should be washed out or weakened by the escaping waters.

If then such are the general principles by which the rights and obligations of the parties are to be measured, it would appear to be the duty of the Court at the present time not absolutely to prohibit the defendant from extending its railroad across the plaintiff's canals, but only to restrain it from making the crossings in such a manner as to infringe upon the plaintiff's rights by diminishing the capacity or impairing the safety of the canals, or unnecessarily increasing the burden of their maintenance; and that is the course which will be pursued. At the present time, however, the record does not furnish sufficient data to enable the Court intelligently to formulate an order properly specifying the manner of making the crossings, and upon the statement of counsel for

the railroad company in open court that no work will be done affecting the canals until further order, the hearing will be continued a reasonable length of time to enable the parties to reach an agreement, covering the conditions which should be imposed upon the defendant; failing in which a further hearing will be had for the purpose of enabling the Court intelligently to prescribe such conditions.

[Endorsed]: Filed February 11, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit for the District of Idaho, Central Division.

IN EQUITY—No. 71.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY (a Corporation), and UTAH CONSTRUCTION COMPANY (a Corporation),

Defendants.

Replication [Filed March 22, 1910.]

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantage of exception which may be had and taken to the manifold insufficiencies of the said answer of the defendants, Minidoka and Southwestern Railroad Company, a corporation and Utah Construction Company, a corporation, for replication

thereto says that it will aver, maintain, and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto, and that said answer of said defendants is uncertain, untrue and insufficient to be replied unto by repliant without this; that any other matter or thing whatsoever in said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true, all which matters and things the repliant is and will be ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho, and Solicitor for Complainant.

[Endorsed]: Filed March 22, 1910, A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the District of Idaho, Central Division.

UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and the UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants.

Decree.

This cause coming on regularly for hearing before the Court on the 18th day of June, 1910, Messrs. C. H. Lingenfelter, and B. E. Stoutemyer, appearing as counsel for the complainant, and D. Worth Clark appearing as counsel for the defendants, and the complainant and the defendants having agreed as to certain of the matters of fact in issue in this cause and having stipulated the same in open court and the same having been entered in the record and testimony having been received as to other issues of fact, and the law and the facts having been duly considered by the Court, now therefore, it is hereby ordered, adjudged and decreed;

1st. That the complainant's prayer for an injunction and restraining order against the defendants herein is denied except as to the crossings over the several canals and laterals constructed by the complainant which crossings are more particularly described below.

2nd. That the defendants and each of them, their agents, officers and assigns, are hereby perpetually enjoined, prohibited and restrained from constructing or building any railroad, or railroad grade, bridge, crossing or structure of any kind on, in, or across the complainant's several canals and laterals herein referred to, or the rights of way thereof, and from occupying the same or any portion thereof except in the following manner and on the following conditions:

That the defendant, Railroad Company, its successors and assigns, shall construct and maintain at its own expense and without expense or cost to the

complainant, or its successors or assigns, the following described structures across the canals and laterals herein mentioned, said structures to be built and maintained in a good and safe and workmanlike manner and in a manner not to interfere with the free flow of the water through complainant's canals and laterals or the free passage of complainant's ditch-riders, employees and agents, and necessary or proper teams, animals, tools and machinery up and down the banks of said canals and laterals for the purpose of operating, repairing and maintaining the same and distributing the water therefrom, and shall keep said structures free from weeds, float or other material that would tend to check the flow of the water in said canals or laterals or endanger the same:

Main Canal Crossings.

The three main canal crossings at Stations 866+43, 1050+05 and 1091+65 on the said Burley to Oakley Branch Railroad, shall be two span pile trestle bridges without more than one pile bent in the water section of the canals. The channel bents shall be parallel with the axis of the canals and shall be boxed in, with a point up stream, so as to allow free passage of weeds and drift. The bottoms of the stringers shall be at least 12 inches above the normal water surface in the canals, the other details of said bridges being more particularly shown on the drawings hereto attached and made a part of this decree.

Lateral Crossings.

1. The crossing of lateral H-26 at Station 1074+00 on the railroad shall be a concrete siphon at

least 4 feet wide and 3½ feet high, inside dimensions, with water way at all points at least equal to 14 square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14916 which is hereto attached and made a part of this decree.

2. The crossing of Lateral J–30, at Station 868 on the said railroad shall be a concrete culvert, at least 4 feet 3 inches wide and 2 feet high, inside dimensions, with water way at least 2 square feet in area, the other details of said culvert being more particularly shown on Drawing No. 14920, which is hereto attached and made a part of this decree.

3. Lateral J–32. The crossing over lateral J–32 at Station 926+71 on said railroad shall be a concrete siphon 5 feet wide and 3 feet 6 inches high, inside dimensions, with water way at least 17½ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14919, which is hereto attached and made a part of this decree.

4. Lateral J–32. The crossing over lateral J–32 at Station 1003+37 on said railroad shall be a concrete siphon 2 feet 6 inches wide and 2 feet 6 inches high, inside dimensions, with water way at least 6¼ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14918, which is hereto attached and made a part of this decree.

5. Lateral H–26A. The crossing over Lateral H–26A at Station 1055+50 on said railroad shall be concrete siphon 3 feet wide, and 2 feet 6 inches high, inside dimensions, with water way at least 7½ square

feet in area, the other details of said siphon being more particularly shown on Drawing No. 14914, which is hereto attached and made a part of this decree.

6. Lateral J–32F. The crossing over lateral J–32F at Station 1012+04 on said railroad shall be a concrete siphon 3 feet wide, and 2 feet 6 inches high, inside dimensions, with water way at least 7½ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14914, which is hereto attached and made a part of this decree.

7. Lateral H–26B. The crossing over lateral H–26B at Station 1069+67 on said railroad shall be a concrete culvert 4 feet 6 inches wide and 2 feet high, inside dimensions, with water way of at least 3-3/5 square feet in area, the other detail of said culvert being more particularly shown on Drawing No. 14917, which is hereto attached and made a part of this decree.

8. Lateral J–32E. The crossing over lateral J–32E at Station 983+00 on said railroad shall be a concrete siphon 2 feet 6 inches wide and 2 feet 6 inches high, inside dimensions, with water way of at least 6¼ square feet in area, the other details of said siphon being more particularly described on Drawing No. 14922, which is hereto attached and made a part of this decree.

9. Lateral J–32B. The crossing over Lateral J–32B at Station 954+17 on the said railroad shall be a concrete siphon 2 feet 6 inches wide and 2 feet 6 inches high, inside dimensions, with a water way

of at least 6¼ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14922, which is hereto attached and made a part of this decree.

10. Lateral J–32G. The crossing over Lateral J–32G at Station 1040+50 on said railroad shall be a concrete siphon 2 feet 6 inches wide and 2 feet 6 inches high, inside dimensions, with a water way of at least 6¼ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14922, which is hereto attached and made a part of this decree.

At all siphons trash-racks shall be provided and maintained by the railroad company at its own expense at both inlet and outlet ends.

If the railroad right of way is fenced, openings shall be left in such fences of sufficient size and suitably located at or near both banks of said main canals and on one side of each lateral, so that the men, teams, and equipment used in maintaining the system, and in repairing breaks and distributing water may readily pass up and down the canals and laterals; or, at its option, suitable gates shall be provided and maintained by the railroad company at such openings of a kind and kept in a condition so that the same can always be readily opened and shut, and it shall be the duty of the agents and employees of the complainant to keep said gates closed except at such time as they are actually using the same.

At each canal and lateral, and in line with the openings in the fence or with the gates to be provided as above specified, the defendant railroad company

shall construct and provide suitable road crossings across its right of way and up to and across its railroad track, so that the complainant's ditch riders and agents, teams and outfits can readily pass over the same without delay.

Changes in the plans and specifications set out herein may be made by the mutual consent of both parties, provided that such consent with a description of the proposed change be in writing, signed by both said railroad company and the representatives of the complainant and filed with the court; and so far as it relates to bridges, ditch crossings, fences, gates, and road crossings this decree is subject to modification upon the application of either party, upon due notice and further hearing.

Dated this 15th day of July, 1910.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 15, 1910. A. L. Richardson, Clerk.

[Testimony, etc.]

In the Circuit Court of the United States in and for the District of Idaho, Central Division.

UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants.

C. H. LINGENFELTER, Esq., and
B. E. STOUTEMYER, Esq.,
Counsel for Complainant.
D. WORTH CLARK, Esq.,
Counsel for Defendants.

June 18, 1910.

Before Honorable FRANK S. DIETRICH, United States District Judge for the District of Idaho.

[Proceedings Had June 18, 1910.]

Mr. LINGENFELTER.—I have prepared a stipulation for the taking of the testimony, which is as follows:

[Stipulations Re Testimony, Facts, etc.]

It is hereby stipulated that in this cause oral testimony of witnesses may be dispensed with, and that the plaintiff and the defendant respectively may make an offer of the facts upon which they rely, and that such may be considered by the Court as the evidence adduced at the hearing, subject to legal objections as to relevancy and materiality, such objections to be made at the time of such offer.

Mr. CLARK.—I would like to have inserted there that they make this offer and it shall become the evidence so far as agreed to,and noted in the record, that is, in other words, when an offer is made by Mr. Lingenfelter to prove a certain thing, if I agree that the offer properly states the facts in the case then it may be considered to be the evidence.

Mr. LINGENFELTER.—Certainly.

The COURT.—That will be understood, gentlemen. You may proceed and if you can't agree on the facts you may prove them.

Mr. CLARK.—I presume that that will not bar either of us from putting in any exhibits that are proper.

The COURT.—No.

Mr. LINGENFELTER.—That the defendant Minidoka & Southwestern Railroad Company is a corporation. I believe that is admitted, isn't it Mr. Clark?

Mr. CLARK.—Yes. It is not formerly admitted, but it isn't denied; I think perhaps it is not formerly admitted, but it isn't denied.

Mr. LINGENFELTER.—That the defendant Minidoka & Southwestern Railroad Company is a railroad corporation, organized and existing under the laws of the State of Idaho; and the defendant Utah Construction Company is a corporation created and existing under the laws of the State of Utah, and entitled to do business in the State of Idaho, and is doing business in said State as a contractor and engaged under contract in constructing the line of railway of said defendant railroad company between Burley Station and the town of Oakley, Cassia County, in said State, and its only connection with the matter involved in this suit is in pursuance of such contract.

Mr. CLARK.—That is agreed to.

Mr. LINGENFELTER.—Second. That the complainant, the United States of America, operating under the provisions of the act of Congress of June 17, 1902 (32 Stat. L. 388), has constructed and is now operating a certain irrigation project, in the State of Idaho, in the counties of Lincoln and Cassia,

consisting of a diversion dam across Snake River, a reservoir on Snake River, and numerous canals, laterals, irrigation ditches and drainage ditches; also an electrical power plant and transmission line, by means of which water is pumped for the irrigation of the lands lying above the gravity canals, all of which said canals, laterals, ditches, transmission lines and irrigation works, including the various canals and laterals hereinafter referred to as being crossed or about to be by the defendant railroad company have been constructed under the authority of the United States, under the provisions of the act of Congress of June 17, 1902, 32 Stat. L. 388.

The COURT.—Hereinafter referred to?

Mr. LINGENFELTER.—That is, by the maps attached to the answer, I think.

The COURT.—Yes, but you are making a stipulation now of the facts.

Mr. LINGENFELTER.—The matters referred to are as follows: That the mains of the Government canals and laterals to be crossed by the proposed Burley to Oakley branch of the defendant's railroad are as follows, and were constructed on the dates written after each. Canals and laterals crossed by the Burley-Oakley railroad:

C Canal (1st lift)	Built March and April, 1908.
H Canal (2nd lift)	Built April and May, 1908.
J Canal (3rd lift)	Built May and June, 1908.
H 26 lateral,	Built June, 1909.
H 26B lateral,	Built June, 1909.
J 32 G	Built September and October, 1909.

J 32 F	Built September, October and November, 1909.
J 32 Sta. 168	Built September and October, 1909.
J 32 E lateral,	Built May, 1909.
J 32 B lateral,	Built June, 1909.
J 32 Sta. 68,	Built May, 1909.
J 32	Built October, 1909.

Mr. CLARK.—Is that all that you care to dictate as to this particular stipulation?

Mr. LINGENFELTER.—On this point, yes.

Mr. CLARK.—I think it would be proper to add to that stipulation, in order that there may be no misunderstanding, that no formal withdrawal was made of a right of way for these canals by the Secretary of the Interior.

Mr. LINGENFELTER.—Except as provided for by the act.

Mr. CLARK.—Well, except as provided by general statute. No formal withdrawal was made under the first subdivision provided for in the withdrawal under the Reclamation Act.

The COURT.—Gentlemen, is all of this colloquy to go into the record?

Mr. LINGENFELTER.—No, your Honor.

The COURT.—How is the reporter to know what is to go in and what is not to go in? It seems to me that this is going to be a very unsatisfactory way to make up this record. It will be very difficult for the Court to determine; it will have to pick a grain of wheat out of a stack of straw, apparently.

Mr. CLARK.—Perhaps the best thing would be

for Mr. Lingenfelter and I to try to prepare a stipulation covering these formal matters.

Mr. LINGENFELTER.—Can't we go ahead, Mr. Clark, with what we have here? It is undisputed, I presume.

Mr. CLARK.—Yes.

Mr. LINGENFELTER.—And supply what is in dispute if we can later.

Mr. CLARK.—I can make up my part of this record in a very few minutes.

Mr. LINGENFELTER.—Third.—Under the canals and irrigation system of the complainant, as at present constructed, there is about 130,000 acres of irrigable land.

Fourth.—That all the lands under said Minidoka Project and the extension thereof are arid in character, and require irrigation to produce agricultural crops thereon, but are productive when irrigated.

Fifth.—That the said Government ditches, canals, and irrigation works, and the proposed extensions thereof are the only means for the irrigation of said lands.

Sixth.—That the lands, ditches and canals which are being crossed and which are to be crossed, and which are about to be crossed by the defendant's said railroad line from Burley to Oakley are a part of that section of said Minidoka Project which is known as the South Side Minidoka Pumping Project.

Seventh.—That said South Side Minidoka Pumping Project is under construction and partly in operation, but additional canals, ditches, enlargements, alterations and extensions thereof are necessary for

the irrigation of parts of said project.

Eighth.—That on November 17, 1902, the Secretary of the Interior, by his order dated November 17th, 1902, under the authority of section 3 of the Act of June 17, 1902 (32 Stat. L., 388), withdrew from entry, except under the homestead law, certain lands believed to be susceptible of irrigation from said works, and ordered that all lands entered and entries made under the homestead law within the areas so withdrawn should be subject to all the provisions, limitations, charges, terms and conditions of said act of Congress of June 17, 1902, known as the Reclamation Act. Among other lands, the Secretary withdrew, under said withdrawal and order, the following described lands:

The Southwest quarter of the Southeast quarter of Section 19, Township 10 South, Range 23 East, Boise Meridian.

All of Section 30, Township 10 South, Range 23 East, Boise Meridian.

And the Southeast quarter of the Southeast quarter of Section 25, Township 10 South, Range 22 East, Boise Meridian.

And all of Sections 1, 11, 12 and 14, in Township 11 South, Range 22 East, Boise Meridian.

Ninth.—That all of said above-described lands were, at the date of said withdrawal, unentered, unoccupied public lands of the United States.

Tenth.—That said order of withdrawal has not been rescinded, nor have said lands been restored nor freed from the conditions or restrictions of the Reclamation Act.

Eleventh.—That the lands in Section 36, Township 10 South, Range 22 East, Boise Meridian, are school lands, granted by the United States to the State of Idaho, and those portions of said Section 36 crossed by said railroad line have heretofore, since 1905, been sold by the State to private parties.

Twelfth.—That the other lands crossed by the said defendant's said railroad line in Sections 19 and 20, of Township 10 South, Range 23 East, Boise Meridian, except the Southwest quarter of the Southeast quarter of Section 19, Township 10 South, Range 23 East, are patented lands, for which patent was issued under the Desert Land Law prior to said order of withdrawal, and which the complainant does not claim to control.

Thirteenth.—That after the withdrawal of said above described lands, as above set out, the said lands so withdrawn and restricted were entered by various persons under the homestead laws, subject to all the provisions, limitations, charges, terms and conditions of said Reclamation Act above referred to, but said entrymen have not yet made final proof or received patent or final certificate, neither have they yet repaid the United States any part or installment of the cost of construction of said project.

Mr. CLARK.—I don't know whether that is true or not. Is that true, that they haven't paid anything?

Mr. STOUTEMYER.—I have certified copies from the land office to show that.

The COURT.—It was claimed at the time of the hearing that some of these men were just about

ready to make final proof.

Mr. STOUTEMYER.—They can't make final proof, under the Reclamation Act, until they have paid all of the charges.

The COURT.—Is it true that none of these entrymen have paid any charges?

Mr. STOUTEMYER.—It is true, yes, sir.

The COURT.—Is it also true, Mr. Stoutemyer, that none of them have made what is called the five-year proof, final proof?

Mr. STOUTEMYER.—There is a difference between five-year proof and final proof?

The COURT.—The reason I ask is, that this stipulation might be subject to misconstruction.

Mr. STOUTEMYER.—Final proof cannot be made until all the payments have been made.

Mr. LINGENFELTER.—Fourteenth.—That the lands shown upon the map attached to the defendant's answer herein as homestead entries are homestead entries made and held subject to the conditions, terms and charges and restrictions of the Reclamation Act.

Fifteenth.—That after the withdrawal of the above-described lands, as above set out, and the entry thereof by the several entrymen, the defendant railroad company went upon said lands and made surveys for a railroad line across the same from said Town of Burley to said Town of Oakley, both in Cassia County, Idaho, and has let contracts for the construction thereof, and that said railroad company and its said contractor, the Utah Construction Company, have gone upon said lands and

partly constructed said railroad grade and railroad line, and is threatening to continue the same to completion, and will continue the same to completion unless restrained by the order of this Court.

Sixteenth.—That said railroad construction and threatened construction follows approximately the lines shown on the map attached to the defendant's answer herein.

Seventeenth.—That said railroad construction and threatened construction consists of a railroad embankment upon which railroad ties and rails are to be laid, the borrow pits from which the earth is removed to form such embankment, and the grades, cuts and fills which are usual in railroad construction, and also several bridges across the several Government canals and laterals of the South Side Minidoka Pumping Project.

Eighteenth.—That said railroad line crosses three of the main canals of said South Side Minidoka Pumping Project, known as the first lift canal, the second lift canal, and the third lift canal, as well as various laterals and smaller ditches.

Nineteenth.—That under the provisions of said Reclamation Act of June 17, 1902, the complainant has expended in excess of $1,300,000.00 in the construction of the irrigation works for the irrigation of the lands lying under said South Side Minidoka Pumping Project, a portion of which is the land above described, which is now being taken possession of, excavated and thrown up into a railroad grade by said defendant railroad company.

Mr. CLARK.—Of course, if the Court holds that

the matters covered by this part of the stipulation are proper to introduce evidence on in this case, then I think that stipulation probably states the fact. However, I object to it for the reason that it is immaterial and incompetent in this case.

The COURT.—Well, perhaps it had better go in.

Mr. LINGENFELTER.—Twenty.—That no portion or installment of the cost of construction of said project has been returned or paid to the United States.

Twenty-one.—That the said lands now being occupied and excavated by said railroad company as a railroad grade are in their natural condition well-suited for irrigation and cultivation.

Twenty-two.—That by said excavation and the construction of said railroad grades, and the digging out of said borrow pits said lands now being occupied and graded into a railroad grade are rendered unsuitable and worthless for irrigation and agricultural purposes.

Twenty-three.—That it is not practical to use for agricultural and irrigation purposes the lands so occupied by said railroad company during its said occupation and use thereof for railroad purposes, and that said lands could not be restored to a suitable condition for agricultural and irrigation purposes without considerable expense in leveling down said railroad embankment and filling said borrow pits, which expense in many cases would be greater than the value of the land in question.

Twenty-four.—That said defendant railroad company has surveyed its said railroad line on and

across three irrigation canals constructed under the authority of the United States, under the provisions of the Reclamation Act of June 17, 1902, and that said defendant railroad company is threatening to and is about to go upon and across said irrigation canals and to construct its railroad line and bridges upon and across the same, as well as across several intervening Government laterals and smaller ditches.

Mr. CLARK.—I would like to have it show that we are crossing these upon the right of way as shown by our map attached to the answer.

Mr. LINGENFELTER.—But upon the right of way shown by the map attached to the answer in this case.

The COURT.—The laterals and ditches referred to being the same as hereinbefore specifically referred to.

Twenty-five.—(Mr. LINGENFELTER.) That said proposed railroad line will cross said Government's first lift canal at approximately the point shown on the map attached to the defendant's answer herein, in Lot 3, of Section 30, Township 10 South, Range 23 East, Boise Meridian.

Twenty-six.—That said proposed railroad line will cross said Government's second lift canal at approximately the point shown on the map attached to the defendant's answer herein, in the Southeast quarter of the Northeast quarter of Section 36, Township 10 South, Range 22 East, Boise Meridian.

Twenty-seven.—That said proposed railroad line will cross said Government's third lift canal at ap-

proximately the point shown on the map attached to the defendant's answer herein, in the Northwest quarter of the Southeast quarter of Section 14, Township 11 South, Range 22 East, Boise Meridian.

Twenty-eight.—That the reclamation homestead entries referred to above were made on the dates shown on the map attached to the defendant's answer herein.

Mr. CLARK.—That is a matter I prefer to put in as a part of my case.

Mr. LINGENFELTER.—We will want you to show that; we don't object to who shows it in the record.

That the reclamation homestead entries referred to above were made on the dates shown on the map attached to the defendant's answer herein. That is your own showing.

Mr. CLARK.—That is the fact.

Mr. LINGENFELTER.—Twenty-nine.—That the three main canals were constructed and operated by the Government prior to the survey for the construction of the railroad.

Mr. CLARK.—I guess that is true. I think they were constructed, and I presume they were operated.

Mr. STOUTEMYER.—I understand it is the intention of the company to build fences around—?

Mr. CLARK.—I suppose so, but I don't recognize your right to ask any such question of me in this case.

Mr. LINGENFELTER.—If the Court please, another phase of this case has come up, and that is

this: The railroad company were given license to construct fences upon its right of way, and the question of maintaining gates to be placed in proper and convenient places should be taken into consideration in this case, it seems to me.

Mr. CLARK.—I presume that is a matter of law. Under the issues in this case, if such an order is proper, I suppose it can be made. I think there won't be any disposition on our part to refuse access.

The COURT.—My impression was, when this matter was on preliminary hearing, that at these points where the canals of the Government were crossed there should be put in and maintained by the railroad company passages for the reasonable accommodation of those who had charge of the canals.

Mr. CLARK.—Yes, I think that is true, your Honor, and we are still willing to do it. As a matter of fact, the engineer in charge tells me he is making arrangements.

Mr. LINGENFELTER.—May it be understood that that part of it may go in the decree?

The COURT.—The record should throw some light upon that just as it does upon the matter of constructing the bridges.

Mr. LINGENFELTER.—I am informed by one of the engineers, Mr. Paul, that they have agreed upon that, upon the place where the gates should be placed and their maintenance. If that is true, that might go into the record.

Mr. CLARK.—I understand that is correct, that

they have agreed as to these matters.

The COURT.—Suppose you agree upon that if you can and put it in in connection with the bridge crossings; it would come in near the same place.

Mr. STOUTEMYER.—That the railroad company is about to and will fence its proposed railroad on both sides down to the water's edge of the Government canals, and that it is necessary for the ditch riders and ditch tenders of the Government canal to pass up and down the bank of the canal at frequent intervals, and that in times of threatened break *of* leak in the canal it would be disastrous to the Government property if they were delayed or hindered in making such crossings and going up and down the banks of the canal to make necessary repairs and to distribute the water.

Is there any objection to that?

Mr. CLARK.—No, I think not.

Mr. STOUTEMYER.—As to the plats of the works, I suppose you will offer that as a part of your—

Mr. CLARK.—Yes; it is really a part of your case, I suppose, still I can offer it.

The COURT.—Those are in such condition that a decree may be formulated upon them?

Mr. STOUTEMYER.—Yes.

The Government maintains that the railroad company has no right to go on or across those canals, or to construct crossings at any points referred to in the complaint. But if it is held by the Court that the company has that right, crossings constructed according to the plans submitted to the Court,

marked Plaintiff's Exhibit "A," as the same were drawn by the railroad company, with the modifications set out in the two copies of letters attached thereto, signed project engineer, and marked Plaintiff's Exhibit "B," will be as satisfactory as any form of bridge.

Mr. CLARK.—I would like to have it in the record that it is also satisfactory to the railroad company.

Mr. LINGENFELTER.—It being further understood that the Government waives no legal rights by the agreement made by the engineers and reduced in the exhibits. In other words, we don't consider that we waive anything by the engineers entering into an agreement as to the character of bridges to be constructed.

Mr. CLARK.—We agree that that character of construction is all right.

Mr. LINGENFELTER.—We don't want to waive the legal right that they can—

The COURT.—I desire to ask counsel for the Government if you agree that the bridge constructed and maintained as called for by these exhibits does not interfere with the flow of the water or imperil the safety of the canal.

Mr. LINGENFELTER.—I understand, your Honor, from Mr. Paul, that the engineers have agreed upon the form of bridge, and in the present form, as agreed upon, it would not interfere with the free flow of the water, and is satisfactory in the present form as agreed upon.

The COURT.—The form of the stipulation as put

by Mr. Stoutemyer is not very satisfactory to the Court. The Court is inclined to require a bridge that will not interfere with the flow of the water and will not endanger the canal. If this bridge is of that form the Government can say so.

Mr. LINGENFELTER.—If the Court holds that they have a right to construct such a bridge, the present form as agreed upon is satisfactory to the Government.

The COURT.—I don't care whether it is satisfactory to the Government or not; I want a bridge that is satisfactory to the Court.

Mr. LINGENFELTER.—The engineers say it is satisfactory.

The COURT.—You may answer the question, whether or not it will interfere with the flow of the water or whether it will endanger the safety of the canal.

Mr. LINGENFELTER.—It will not, as agreed upon, if properly maintained.

That, if the Court please, covers all the offers made by the Government except the question of future canals, and I suggest that we adjourn until two o'clock and get our testimony in proper shape.

The COURT.—Very well.

At this time an adjournment was taken until 2 o'clock.

At 2 o'clock the hearing was resumed, and the following proceedings were had, to wit:

[Testimony of Charles H. Paul, for Government.]

CHARLES H. PAUL, a witness called on behalf of the Government, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. LINGENFELTER.)

Q. State your name.

A. Charles H. Paul.

Q. State your occupation.

A. Civil engineer.

Q. In whose service are you now employed?

A. The United States Reclamation Service.

Q. How long have you been acting for the Reclamation Service? A. About five years.

Q. What projects have you had charge of?

A. The Lower Yellowstone Project in Montana, and the Minidoka Project in Idaho.

Q. How long have you been working on the Minidoka Project?

A. For about eight or nine months.

Q. Have you been there continuously since the canals and laterals were constructed?

A. Since construction started?

Q. Yes.

A. No; since last October I have been there.

Q. What canals, or how many canals and laterals have been constructed under the Minidoka Project?

A. I can't give the number without referring to

(Testimony of Charles H. Paul.)

our records. There are several hundred miles of canals and laterals.

Q. How many main canals?

A. There are three main canals on the South Side Project, that is, the lands in question.

Q. How many acres, approximately, can be irrigated under the present system, in addition to the lands now provided for, by extension of the present pumping system? A. About 8000 acres.

Q. Assuming that 8000 acres can be irrigated in addition to what is now provided for, how many main canals and approximately how many laterals would be required?

Mr. CLARK.—That is objected to as incompetent and immaterial, and not within the issues in this case, in so far as it is an attempt to show that additional canals outside of those now laid out and constructed will be required.

The COURT.—The objection is sustained. He may answer, however, so that the record may be made up.

A. There would at least be one main canal required, and possible half a dozen laterals.

Mr. LINGENFELTER.—Q. What would be the approximate cost of construction, what would be the difference of the cost of constructing a canal such as would be required to irrigate the lands stated, before any railroad construction was done, and what would be the cost after the construction was done?

Mr. CLARK.—I object to that as incompetent and

immaterial, and not within the issues involved in this case.

The COURT.—I hardly see how the witness could answer that intelligently, unless he knows what you want.

Mr. LINGENFELTER.—Q. Are you able to state, Mr. Paul, what would be the difference in the cost of the construction of a canal, I mean across the present roadbed, before the railroad construction and at the present time, assuming that there was no railroad bed there?

The COURT.—Well, obviously, Mr. Lingenfelter, that would depend upon the size of the canal and the place where—

Mr. LINGENFELTER.—Q. What is the general topography of that country where this land is to be irrigated?

A. It is generally an even slope.

Q. Level country, is it?

A. It is a gradual slope.

Q. Well, would there be any difference in the cost of construction on certain parts of the land and other parts? A. Yes.

Q. Explain what that difference would be now.

A. Well, it would all depend on the location, the elevation of the railroad, with reference to the elevation of the water in the canal, as to what the cost of the crossing would be.

Q. Well, would it cost any more to construct a canal where the ground is uneven than where it is even?

(Testimony of Charles H. Paul.)

A. Well, it might and it might not; probably would.

Q. What would be the size or dimensions of the canal such as would be required for the irrigating of the 8000 acres of land as testified?

A. It would be about four feet wide on the bottom and four to five feet deep.

Q. What would be the width?

A. About four feet wide on the bottom, with one and a half to one side slopes.

Q. Can you approximate the cost of construction before the railroad is built of such a canal?

A. Yes, sir.

Q. State what that would be.

Mr. CLARK.—That is objected to as incompetent and immaterial, and not within the issues in this case in any way.

The COURT.—Sustained. You will understand, gentlemen, that I am ruling upon these questions as a Master would.

Mr. LINGENFELTER.—I understand, your Honor. The plaintiff offers to show what the cost—

The COURT.—You may proceed. He may answer.

A. It would cost approximately $20.00 for the construction of a hundred feet of canal.

Mr. LINGENFELTER.—Q. Before any railroad was built?

A. Under the conditions as they are before the railroad is built.

Q. What would be the approximate cost of the

(Testimony of Charles H. Paul.)
construction of such a canal after the railroad is built or constructed?

Mr. CLARK.—Objected to as incompetent and immaterial, and not within the issues.

The COURT.—Sustained. I really can't see how the witness can intelligently answer the question. If he thinks he can, he may answer it.

Mr. LINGENFELTER.—Go ahead.

A. My estimate would be that it would cost somewhere between $500.00 and $1500.00.

Q. You mean to say it would cost all the way from $500.00 to $1500.00 more after the railroad is built than it would be before there was any railroad construction to put through such a canal?

A. Yes, sir.

Q. What would be the elements of additional cost?

A. Before the railroad was there no structure would be necessary; after the railroad was built a structure would be indispensable, a structure of some sort.

Q. Now, you say it would cost from $500.00 to $1500.00 difference? What do you mean by that? Why do you give that range?

A. Well, if it would be possible to put in a bridge to carry the railroad across the canal with a bridge, it might be done for $500.00, but if the railroad is so located with reference to the water surface in the canal that a bridge would not be possible, that is, if the water surface in the canal was higher or nearly as high as the tracks it would be necessary to drop down

(Testimony of Charles H. Paul.)

under the railroad and come up on the other side; that would necessitate a structure which we call an inverted siphon, and the construction of that would run in the neighborhood of $1500.00.

Q. In estimating the cost of the bridge are you taking into consideration such a bridge as is being placed over the canals already in operation?

A. I am giving a very rough estimate of the cost of a bridge such as is proposed to put over the present canal.

Q. What requirements have been made by the railroad company, if any, in making crossings for laterals under lands withdrawn where the railroad has already constructed its roadbed, and there no provision has been made for the construction of such canals or laterals?

Mr. CLARK.—That is objected to as incompetent and immaterial.

The COURT.—Sustained. He need not answer that.

Mr. LINGENFELTER.—If the Court please, this morning it was suggested by the Court that the bridges as agreed upon by the engineers would be satisfactory or would be sufficient, in other words, to cause the water to have a free flow, without any obstruction or danger to the bridge. Now the present form as agreed upon will be satisfactory if it is properly maintained, that is to say, if the weeds are kept away from the abutments on the bridge, if there is a proper maintenance of the bridges under the present form as agreed upon they will be satisfactory; other-

(Testimony of Charles H. Paul.)

wise they would clog the abutment and cause some danger to the bridge and stop the flow of the water.

Mr. CLARK.—We are now and have been at all times willing in this case—

The COURT.—I don't see that there is anything before the Court at this time.

Mr. LINGENFELTER.—I was going to say that if that was agreed upon, that these bridges would be properly maintained, it wouldn't be necessary to go into this class of testimony.

Mr. CLARK.—We recognize the fact that we must maintain these bridges.

Mr. LINGENFELTER.—That's all.

Mr. CLARK.—That's all.

Mr. LINGENFELTER.—That is all, your Honor.

The COURT.—Q. Where is this 8,000 acres of land, Mr. Paul?

A. It is just south and adjoining the present project.

Q. This railroad line will lie between the head works of your system and this land?

A. It cuts across the land.

Q. It cuts across the land?

A. Across the land.

Q. How much of it lies below the railroad right of way?

A. Well, I can't say, but several—but a considerable portion of it, several hundred acres at least, maybe two or three thousand,—I can't say without consulting the records.

Q. Of course you wouldn't need to cross the rail-

(Testimony of Charles H. Paul.)

road right of way for the purpose of irrigating that which lies above it?

A. No; simply for that below; there is some *of below* the railroad.

Q. Have you actually projected a canal for the irrigation of the lands lying below?

A. The irrigation of this land has been considered, yes, sir, and canals have been projected, yes.

Q. Are you now in the act of constructing them?

A. No.

Q. Has any appropriation been made for their construction?

A. No; the construction has not yet been authorized.

Q. Then, as a matter of fact, there isn't any definite decision to irrigate these lands? A. No.

Q. It is merely a possibility?

A. Yes.

Mr. CLARK.—No questions.

Mr. LINGENFELTER.—That's all.

[Proceedings Re Certain Paragraphs of Answer, etc.]

Mr. CLARK.—It is agreed by and between the counsel for the respective parties in this action that the allegations contained in paragraphs numbered 1, 2, 3, and 4, as found on pages 8 and 9 of the answer in this case, are true and correct, and the facts therein stated are agreed to be the facts, for the purpose of this case.

The COURT.—Are those paragraphs numbered?

Mr. CLARK.—Yes.

Mr. LINGENFELTER.—What numbers did you say, Mr. Clark?

Mr. CLARK.—Number 1, 2, 3 and 4. Those are the formal allegations of our incorporation and our right to do business, and our compliance with the constitution and laws of the State of Idaho.

Mr. LINGENFELTER.—The Government does not resist the statement as to the truth of the facts set forth in paragraph 4, but objects to the matters therein contained as incompetent and immaterial for any purpose in this case.

The COURT.—Incompetent or irrelevant?

Mr. LINGENFELTER.—Irrelevant.

The COURT.—What is 4? Let me see it.

Mr. CLARK.—I will pass it back to your Honor.

The COURT.—Overruled.

Mr. CLARK.—It is agreed that none of the lands included within the boundary lines of the reclamation project in question where the right of way in question passes over the same have been withdrawn under the first class of reservation contained in the Reclamation Act, and that at such places as the word withdrawal is referred to in these stipulations is meant such withdrawal as is provided for in said Reclamation Act under the second class, that is, a withdrawal from all forms of entry except under the Homestead Act, subject to the restrictions imposed by the Reclamation Act governing such homestead entries.

I now offer in evidence Defendant's Exhibit No. 1, it being exemplifications or certified copies of papers filed in the office of the Secretary of the Interior by the Minidoka & Southwestern Railroad Company,

showing compliance with the act of March 3, 1875, for the purpose of obtaining the benefit from that act over the lands in question for the purpose of a right of way. They show a letter signed, as I recollect it now, by the Acting Secretary, Pierce, to the effect that they are in due form, and, as I understand, recommending them for approval. The position that we would take in that matter is that this certificate that they are in due form and in full compliance with the act would compel their approval by the Secretary of the Interior, that the law would give him no discretion, if they are in compliance.

Mr. LINGENFELTER.—The plaintiff objects to the introduction of Defendant's Exhibit 1, for the reason that no plan or profile of the route has been filed with the Secretary of the Interior, and for the further reason that the Secretary of the Interior has not approved the exhibits.

Mr. CLARK.—The last amendment, if the Court please, in so far as it has been passed upon by the Secretary of the Interior, is shown there.

The COURT.—These don't purport to show the profile?

Mr. CLARK.—No.

The COURT.—The objection is overruled.

Mr. LINGENFELTER.—Note an exception.

Mr. CLARK.—I should like to call Mr. Robinson for a question.

[Testimony of Robert B. Robinson, for Defendants.]

ROBERT B. ROBINSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. You may state your name, residence and occupation.

A. Robert B. Robinson, residence, Salt Lake, occupation civil engineer.

Q. Are you in the employ of the defendant company? A. Yes, sir.

Q. What, if anything, do you have to do with the buildings of the road in question from Burley to Oakley?

A. I have local charge of the construction.

Q. Do you know where the right of way is over the lands in question here? A. Yes, sir.

Q. When was construction work commenced over the lands in question?

A. Very shortly after the 1st of November, 1909.

Q. Up to the time this suit was brought what, if anything, has been done towards locating on the ground the right of way over the land in question?

A. Well, the center line of the track had been staked out, and part of the cross sections for the grading.

Mr. LINGENFELTER.—Wait a minute, Mr. Robinson. What was your question, Mr. Clark, there again?

(The stenographer thereupon read the last ques-

(Testimony of Robert B. Robinson.)
tion and the answer thereto.)

Mr. CLARK.—Q. Approximately what part of the grading had been done for the road?

A. Well, I can't recall that from memory.

Q. Can you recall approximately how much?

A. I shouldn't like to attempt it.

Q. Well, can you say whether it was any considerable portion or not?

A. Yes, sir, grading had been under way.

Q. Was this permanent or temporary construction of the road? A. Permanent.

Mr. CLARK.—I think that is all.

Cross-examination.

(By Mr. LINGENFELTER.)

Q. When did you say this construction was made, in what year? A. It started in 1909.

Q. 1909? A. Yes, sir.

Q. Then at the time this land was withdrawn under the Reclamation Act proper there hadn't been any work done, had there?

A. I know nothing about it.

Q. Well, say it was withdrawn in 1903, there hadn't been any work done at that time?

A. No, sir.

Q. What work had been done, did you say, before the commencement of this suit?

A. Grading work.

Q. How much grading had been done?

A. I can't recall the *proportion the* different miles. I gave it once from actual records.

Q. Can you recall any permanent construction

(Testimony of Robert B. Robinson.)

work? A. Yes, sir.

Q. Before this suit was commenced?

A. Yes, sir.

Q. What did it consist of? A. Grading.

Q. How much grading?

A. As I have already stated, I can't remember, and wouldn't attempt to.

Q. Can't you approximate it?

A. No, sir.

Q. All you know is that some grading was done before this suit was commenced? A. Yes, sir.

Q. You can't tell how much?

A. I don't remember.

Q. The line of the road was staked out, was it?

A. Yes, sir.

Redirect Examination.

(By Mr. CLARK.)

Q. Since this suit was commenced has there been any change in the location of the road?

A. No, sir.

Q. Over the land in question? A. No, sir.

Q. What is the present condition of the grade over the land in question?

A. The grading is completed.

Mr. CLARK.—That's all.

Recross-examination.

(By Mr. LINGENFELTER.)

Q. Can you give the date of the first work that was done on this road between these points?

The COURT.—What kind of work? Surveying or actual grading?

(Testimony of Robert B. Robinson.)

Mr. LINGENFELTER.—Construction work.

Q. Can you give the date of the first construction work that was done on this road?

A. No, sir, not from memory. It is a matter of record. I can give you the record.

Q. Can you approximate it?

Mr. CLARK.—I will show you this affidavit; perhaps you may be able to refresh your recollection (showing witness document).

A. My recollection is that it was about the 11th of November.

Mr. LINGENFELTER.—Q. Of last year?

A. 1909, yes, sir.

Q. Prior to that time the road hadn't been mapped out, no stakes had been driven and no grading had been done?

A. The road had been staked out long before that.

Q. How long before that?

A. My recollection is that it was in June and July, 1909.

Q. 1909? A. Yes, sir.

Mr. LINGENFELTER.—That's all.

Mr. CLARK.—That is all, Mr. Robinson.

[Proceedings Re Certain Homestead Entries, etc.]

Mr. CLARK.—It is agreed by and between counsel for the respective parties that Lorenzo W. Robins made homestead entry No. 2550 on May 19, 1904.

Mr. LINGENFELTER.—Can't you abbreviate it by showing that the entrymen have granted the right of way so far as in their power lies across certain sections?

Mr. CLARK.—I think I can abbreviate it by simply putting this map in, if you will agree that it is correct.

(Whereupon the map was marked by the stenographer as Defendant's Exhibit No. 2.)

It is stipulated and agreed that the various parties shown on Defendant's Exhibit No. 2, as having made homestead entries upon land over which the right of way in question passes, in so far as it is contained within the boundary lines of this reclamation project, made such homestead entries at the various times stated on Defendant's Exhibit No. 2, subject to the charges, terms and restrictions of the Reclamation Act, and have, since the time of their various entries, been in possession of said lands, and said entries are still intact. Is that agreed to?

Mr. LINGENFELTER.—With the exception of the possession of the canals and laterals. Of course they wouldn't be in their possession.

Mr. CLARK.—Except such possession as the Government has of canals and laterals owned by the Government, crossing said tracts of land; such possession and right of the Government, however, does not depend upon any reservation or withdrawal made under the first form of withdrawal of the Reclamation Act.

It is further agreed that each and all of the parties shown to have made homestead entry upon the lands in question on Defendant's Exhibit No. 2, down to the center line of Section 14, Township 11 South, Range 23 East, Boise Meridian, have conveyed to the defendant company, Minidoka & Southwestern Railroad Company, by good and sufficient deeds, such

right as they were able to convey for a right of way over the land in question, such right of way so conveyed being the right of way upon which the defendant company is, and was at the time of the commencement of this suit, constructing its railroad. Is that all right?

Mr. STOUTEMYER.—Of course, we don't know that, but if you assure us that they have, we will take your word for it.

Mr. CLARK.—I have the deeds here.

Mr. STOUTEMYER.—Yes, we will agree to that.

Mr. CLARK.—That Section 36, Township 10 south, Range 23 East, Boise Meridian, is a school section, and where the right of way of the defendant company crosses said section within the boundary lines of this reclamation project the State of Idaho has contracted to convey said land to various parties.

Mr. STOUTEMYER.—At that point I would like to have you set out that they contracted to convey it after 1905. The materiality of that is that in the year 1905 the State granted the—the reason is that in 1905 the State, or the legislature, granted rights of way for canals across the lands in question.

Mr. CLARK.—Well, it may show that.

Said various parties to whom the State of Idaho has conveyed and contracted to convey said land situated in Section 36, over which said right of way passes, have conveyed to the defendant, the Minidoka & Southwestern Railroad Company, a right of way over said land, and it is upon said right of way so conveyed that said defendant company was at the time of the commencement of this suit and is now con-

structing said railroad.

That all of the land over which said railroad is constructed, situated within the boundary lines of this reclamation project, is either patented land, land formerly school land, but which has been contracted by the State to be conveyed or conveyed to private parties in possession of the same, or lands upon which parties have filed homestead entries under the provisions of the Reclamation Act, said parties being in possession of said land.

Mr. LINGENFELTER.—There is no contest over any lands except the lands withdrawn under the Reclamation Act, any other lands being immaterial so far as this action is concerned.

Mr. CLARK.—That is, there is no contest, except those upon which homestead entries exist?

Mr. LINGENFELTER.—Upon withdrawn lands.

Mr. CLARK.—Well, is it agreed that parties have filed upon all of the withdrawn lands under the provisions of the Homestead Act, as provided for in the Reclamation Act, where the right of way of the defendant company passes over the same?

Mr. STOUTEMYER.—Yes. That is covered by our stipulation, that it was filed upon on the dates shown.

Mr. CLARK.—That is the fact, is it?

Mr. STOUTEMYER.—That is as I understand.

Mr. CLARK.—Will my statement be agreed to?

Mr. STOUTEMYER.—Yes.

Mr. CLARK.—I think that will complete our proof.

Mr. STOUTEMYER.—There is one point in

which one of your stipulations is indefinite. You said down to the center line of Section 14. A section has two center lines; one runs north and south and one runs east and west, and it is understood that you refer to the center line running east and west through the section?

Mr. CLARK.—Yes, running east and west. However, as I understand it, below the center line Section 14 has been filed upon by homestead entry.

Mr. STOUTEMYER.—That is included in the stipulation.

Mr. LINGENFELTER.—I would like to recall Mr. Paul for one question.

[Testimony of Charles H. Paul—Recalled for Government.]

CHARLES H. PAUL, recalled as a witness for the Government, testified as follows:

Direct Examination.

(By Mr. LINGENFELTER.)

Q. Mr. Paul, referring back to your testimony to the effect that 8000 acres of land are susceptible of irrigation adjacent to the land under the Minidoka Project proper, what arrangements have been made, if any, for the irrigation of the 8000 acres testified to by you?

A. Do you mean in the line of surveys or construction, or both?

Q. In the construction.

A. The power plant has been constructed large enough to develop power for the pumping of water on to these lands, and the pumping stations have

(Testimony of Charles H. Paul.)

been so constructed that the necessary pumps may be installed to pump the water, three pumping sta tions.

Mr. LINGENFELTER.—That is all.

Cross-examination.

(By Mr. CLARK.)

Q. You refer to the pumping station for the irrigation of this entire body of land, do you?

A. Yes.

Q. That wasn't constructed particularly for this 8000 acres?

A. The pumping stations which pump water to the 50,000 acres included under the South Side Project are so constructed that additional pumps may be installed for the irrigation of the 8000 acres just adjacent to the project.

Mr. CLARK.—That's all.

The COURT.—Q. Do I understand that this 8000 acres is not included in the project?

A. At the present time, no, sir. That is, no allotment has been made by the Secretary for the construction of works to irrigate this 8,000 acres, with the exceptions—

Q. This 8,000 acres is simply an additional project? A. It is a possible extension.

Q. I understood that it was part of the original project. It is simply a possible extension?

A. A possible extension of the present project, yes.

The COURT.—That is all.

Mr. LINGENFELTER.—That is all. We rest.

After argument by counsel for the respective parties, the following proceedings were had, to wit:

[Proceedings Had After Argument.]

Mr. CLARK.—I will say that Mr. Robinson just informs me that no conveyance, no actual conveyance has been procured for the south half of Section 14. He says that the man in possession of it made no objection, and it was the understanding that settlement would be made with him later, when they get together, that the men had that understanding. Now the only thing I could do, as I understand it, would be to bring some person here who knows that that understanding was had between those parties. I don't know but what you might agree that that was the fact upon Mr. Robinson's statement.

Mr. STOUTEMYER.—We don't know that, and we don't consider that material anyhow.

Mr. CLARK.—Of course, if you don't that is what we could show by bringing another witness here, as I understand it.

Mr. LINGENFELTER.—Of course, if the Court wants to leave it open for you to make further showing, he has a right to do so.

Mr. CLARK.—We couldn't make any further showing than that, as I understand.

The COURT.—Do you desire the case left open for the making of that showing? Of course, I assume, gentlemen, that neither side is standing upon a technicality in this case.

Mr. CLARK.—Would you not agree that our wit-

ness, if we brought him here, would testify as I have stated? You say it is not material. If the Court please, I couldn't get him here before the latter part of next week. I have a case set at St. Anthony for Monday. If, under the showing made here, the Court would consider such testimony as that material,—I myself don't consider it as being very material,—but we can make that showing, if the Court thinks it might be material.

Mr. LINGENFELTER.—You have arrangements made for the conveyance, have you?

Mr. CLARK.—No. He stated to the parties in charge that they could go ahead and construct the road, and that arrangements could be made later. The grading is done all through his land now.

Mr. LINGENFELTER.—It is not the desire of the Government, you know, to take advantage of any technicality in this case. At the same time, it might become material. The Court can leave it open if he desires, and they can make a showing.

The COURT.—Well, I am not sure whether I should consider it material or not. It is for you gentlemen to say whether or not you desire to put it in the record. It may be material.

Mr. CLARK.—When could you hear that proof?

Mr. LINGENFELTER.—I would like to have the case decided as soon as possible; whenever it would accommodate you, however.

Mr. CLARK.—As I say, I have cases set for the first of next week at St. Anthony, and I can come back here a week from to-day and bring this witness.

Mr. LINGENFELTER.—I think, your Honor, we

can agree that if the witness were present he would testify to what is stated.

Mr. CLARK.—That is all we ask.

Mr. LINGENFELTER.—You admit that no conveyance is made?

Mr. CLARK.—Yes, we admit that.

Mr. LINGENFELTER.—We admit that if he were present he would admit that state of facts.

The COURT.—This really amounts to a license then to construct the railroad upon this land, so far as the entryman is concerned, so far as he could give the license.

I think, gentlemen, that I shall adhere to the views expressed at the time of the preliminary hearing. I am unable to see how the railroad could acquire a right of way over lands occupied by the ordinary homestead entryman if the construction is put upon the statute which is now contended for by the Government. I don't think that the act of March 3, 1875, applies to land embraced within a homestead entry, and such, as I understood it, was the contention of the Government before. I thought it was the correct contention at that time, and still think so, that that act applies only to public lands of the United States; and lands which are embraced within a homestead entry are not public lands of the United States. If that view be correct, and if we accept the construction of the other act now urged by the Government, it must be conceded that no one can go upon lands embraced in a homestead entry, even if he has secured a deed from the entryman, without infringing the rights of the United

States. I think that this other act must be held at least to license the occupancy by a railroad of lands embraced in a homestead entry when the permission of the homestead entryman is secured. It isn't a question of a liberal construction of the grant. It is a question of giving a practical construction, as I look at it. I can't see how any other view can be taken and give the law effect.

However, perhaps I cannot add anything to what was said upon that point in the memorandum opinion heretofore filed. The rule undoubtedly is that in the case of a public grant the grant is construed strictly against the grantee in favor of the Government. There are some considerations held to differentiate the grant of a right of way for the construction of a public highway which is presumably for the public interest from a grant the beneficial interest of which is entirely with the grantee. However, I do not regard such considerations as highly material at this time. As already suggested, it isn't a question of liberally construing the act referred to in favor of the grantee, but of giving to it a construction which makes it effective for any purpose. It would be idle to say to a homestead entryman: "You may grant to a railroad a right of way across your land and warrant the right as against your own acts," if, after the railroad company pays the entryman the purchase price for such right of way and takes a deed, when it undertakes to make use of its purchase, the Government may step in with an injunction and restrain the railroad company from proceeding to construct a railroad upon that right of

way because the Government's primary title has not been extinguished, especially in view of the fact that there is no legal method for extinguishing such title or acquiring license from the Government other than the method here pursued. It seems to me that this is the logical and only conclusion that the Government's contention leads to. I may be wrong, but I can't see it in any other way at present, and the considerations which were urged today do not seem to me to require or justify receding from the position heretofore taken.

Unless there is some authority other than those to which reference has been made, that is, the two cases cited from the 25th and 26th Federal, with regard to issuing an injunction to protect the Government's interest, I see no reason for adopting a different view from that expressed before, and that is, that an injunction will not issue in favor of the Government where it is not injured, where its rights are not invaded.

Now it is agreed here that if the Court requires the railroad company to put in bridges of a certain character no injury results to the Government. The safety of the canals is not jeopardized, the flow of the water is not interfered with, their utility is in no wise affected or diminished. Provision will be made, of course, in the decree for the maintenance of these bridges, and some proper provision will also be made for passageways.

Nor am I able to take the view that this reservation by the Government of a right of way over the public lands is the reservation of the fee. It seems

to me that the only practical view to take of that is that Congress intended to reserve to the Government an easement. An easement subserves every needful purpose; it enables the Government to carry out in full its irrigation plans. It is quite evident to my mind that it was the intention of Congress to reserve to the Government only the right to construct and maintain its canals across these lands for irrigation purposes, and in that view it holds the right to occupy only such portion of the land and make such use of it as may be reasonably necessary to carry out this purpose, and the land which it may occupy may be a wider or a narrower strip, as the necessities require. It couldn't keep a farmer from growing grass or hay upon land right up to the water line of the canal, provided the growth of the grass or hay doesn't interfere with the use of the land by the Government for irrigation purposes. It would, I think, be unreasonable to construe the law to the effect that the Government may go in and take a strip of land 100 feet wide, whether it needs it or not, for its canals, and thus keep the farmer from utilizing the surface of the strip merely because somebody may think that at some time it would be a little more convenient to have so wide a strip. If a farmer desires to utilize the land right up to the bank of the existing canal he may do so; he may plant his crops and sow his grain, but if it becomes necessary for the Government to pass over his grass or grain in order to maintain the canal, it has a right to do so. His rights are subject to the uses of the Government of the land for a cer-

tain purpose, its reasonable use for a certain purpose; but the farmer is not excluded entirely. In other words, he has the primary title, the principal title, and the Government retains an easement for the purposes specified. If, as is contended, the Government retains the fee to the right of way, what passes by patent to the entryman? The Government claims the legal right to appropriate any or every part of the entry, as it may have need, for rights of way; if so, and if it retains the fee of the right of way, then how can the patent operate to convey to the entryman the fee of any portion of the tract?

So far as I know, no construction has been put upon this act, and I assume that no Court has construed it or the decision would be called to my attention, but until there is some authoritative construction contrary to this I shall take that view; that is, that the Government retains an easement only.

Mr. LINGENFELTER.—Of course, it is understood that the Government waives no legal right by reason of its stipulation that the bridges, if constructed in the manner agreed upon, will not interfere with the flow of the water or jeopardize the safety of the canals.

The COURT.—You had that in twice, that you waive no right. That is the reason why I asked you the question as to whether or not the flow of the water would be interfered with or the safety of the canal jeopardized. It has been my purpose from the beginning to require that the Government not be

injured. The Government has the right to occupy those canals and to use them, and use them conveniently; in other words, its right against the railroad company is the same as its right against the farmer. The Government has a right to pass up and down the canal for all reasonable purposes. As I said a moment ago, if a farmer chooses to sow his grain right up to the banks of the canal he may do so, with the possibility all the time that the canal riders will trample down some of it; if so, none of his rights are interfered with, because his rights are subject to those of the Government. So with the railroad company. I am simply trying to construe these laws in such a way as to fully protect every reasonable claim of the Government, every right, so that it may carry out its scheme of irrigation here and yet not impede the reasonable development of the country, and prevent the use of the land by farmers and others for purposes which do not interfere with canal construction or maintenance.

Mr. LINGENFELTER.—Does the Court care to make any intimation with respect to the regulation of future canals?

The COURT.—I do not.

[Certificate Re Facts.]

It is hereby certified that the foregoing, together with the exhibits and other papers therein referred to, in substance sets forth the facts upon which the decree herein was entered.

Dated this 19th day of December, 1910.

FRANK S. DIETRICH,
District Judge.

Filed, December 19th, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the District of Idaho, Central Division.

UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY (a Corporation),
Defendant.

Order [Re Decree].

It being made to appear that it will be necessary to use temporary structures for the purpose of installing the permanent bridges provided for in the decree this day signed and filed herein, it is ordered that said decree be not construed so as to prohibit the installation and use of such necessary temporary structures, or to prohibit interference with the lateral ditches belonging to the plaintiff, to such an extent as may be necessary in installing the siphons and other conducts called for by the decree; provided, that the defendants must not interrupt the flow of water or diminish the amount of the delivery of water through any of said canals or ditches while installing the permanent structures, without first procuring the written consent of the plaintiff's

authorized representatives.

Dated this 15th day of July, 1910.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 15, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant and Plaintiff in Error,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants and Defendants in Error.

Assignment of Errors.

And now comes the United States of America, plaintiff in error, and files this its assignment of errors.

1. The United States Circuit Court of the District of Idaho, Central Division, erred in refusing the plaintiff's application and petition for an injunction restraining the defendants from going upon and occupying the irrigable lands of the plaintiff's Minidoka Project described in the complaint and withdrawn by the Secretary of the Interior under the second form authorized by the Act of Congress

of June 22, 1902 (32 Stat. L. 388), and particularly the following subdivisions:

The SW.¼ SE.¼ of Sec. 19, T. 10 S., R. 23 E. Sec. 30, T. 10 S., R. 23 E., B. M.

The SE.¼ SE.¼ of Sec. 25, T. 10 S., R. 22 E., B. M. Sec. I, T. 11 S., R. 22 E., B. M. Sec. 11, T. 11 S., R. 22 E., B. M. Sec. 12, T. 11 S., R. 22 E., B. M. Sec. 14, T. 11 S., R. 22 E., B. M.

2. That said Circuit Court of the District of Idaho erred in refusing to enjoin the defendants from building thereon and excavating and digging out and throwing up a railroad line and railroad grade on and across said above described subdivisions of land or any of them.

3. That said Circuit Court of the District of Idaho erred in refusing to enjoin said defendants from so digging out, occupying and throwing up said lands without the consent or approval of the Secretary of the Interior.

4. That the said Circuit Court of the District of Idaho erred in refusing to enjoin or restrain the defendants from destroying portions of said withdrawn lands and rendering them useless for agricultural and irrigation purposes.

5. That the said Circuit Court of the District of Idaho erred in refusing to enjoin the defendants from occupying, digging out and throwing up portions of said lands into a railroad grade and railroad line on and across those portions of said above described subdivisions which are included in the entries of homestead entrymen from whom said de-

fendants have not obtained deeds or contracts, particularly the South half (S. ½) of Sec. fourteen (14), Twp. eleven (11) South, Range twenty-two (22) East, B. M.

6. That the said Circuit Court of the District of Idaho erred in signing and filing the final decree herein and particularly that part thereof refusing the plaintiff's petition for relief by injunction and restraining orders as prayed for in the complaint.

S. L. TIPTON,

Asst. United States Attorney for the District of Idaho.

[Endorsed]: Filed Dec. 13, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY (a Corporation),

Defendants.

Petition on Appeal With Allowance Endorsed.

To the Honorable FRANK S. DIETRICH, District Judge, and Judge of the above-named Court Presiding therein:

The above-named complainant in the above-entitled cause conceiving itself aggrieved by the order

and decree made and entered by the above-named court in the above-entitled cause under date of July 15, 1910, wherein and whereby it was and is ordered, that the complainant's prayer for an injunction and restraining order against the defendants herein is denied, except as to the crossings over the several canals and laterals constructed by the complainant, and particularly from that part thereof which provides;

> "1st. That the complainant's prayer for an injunction and restraining order against the defendants herein is denied except as to the crossings over the several canals and laterals constructed by the complainant which crossings are more particularly described below."

for the reasons set forth in the assignment of errors which is filed herewith, and the complainant prays that its petition for its said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 13th, 1910.

S. L. TIPTON,
Asst. U. S. Attorney for District of Idaho, Boise, Idaho.

B. E. STOUTEMYER,
Attorney, Boise, Idaho.
Attorneys for Complainant.

Order [Granting Appeal].

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

Done in open court this 13th day of December, 1910.

FRANK S. DIETRICH,
District Judge, and Judge of the said United States Circuit Court presiding therein.

[Endorsed]: Filed Dec. 13, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants.

Order to Send Up Original Exhibits.

On motion of C. H. Lingenfelter and B. E. Stoutemyer, attorneys for complainant;

It is ordered that in addition to the transcript of the record on appeal in this action, that the Clerk of this court transmit to the Clerk of the United States Circuit Court of Appeals at San Francisco, California, the following original papers in this action to be by him safely kept and returned to this

Court upon the final determination of this action in said Court of Appeals, namely:

Plaintiff's Exhibit "A."

Plaintiff's Exhibit "B."

Defendants' Exhibit 1–2.

Map attached to Bill of Complaint.

Map attached to Answer of Defendant Minidoka & Southwestern Railroad Company, marked Exhibit "A."

Dated this 14th day of December, 1910.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Dec. 14, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States Ninth Judicial Circuit for the District of Idaho, Central Division.

IN EQUITY—No. 71.

THE UNITED STATES OF AMERICA,
Complainant and Appellant,
vs.
MINIDOKA & SOUTHWESTERN RAILWAY COMPANY (a Corporation), and UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants and Appellees.

Praecipe for Transcript on Appeal.

To the Clerk of the Above-entitled Court:

An appeal having heretofore been perfected in the above-entitled cause to the Circuit Court of Appeals

for the Ninth Circuit, you are hereby requested to prepare a transcript of the record for transmission to the said Appellate Court at San Francisco, California, on behalf of the United States of America, Complainant and Appellant.

Dated this 22 day of December, 1910.

C. H. LINGENFELTER,

United States Attorney for the District of Idaho and Counsel and Solicitor for Complainant and Appellant.

In the Circuit Court of the United States in and for the District of Idaho, Central Division.

UNITED STATES OF AMERICA,

Complainant and Appellant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation), and THE UTAH CONSTRUCTION COMPANY (a Corporation),

Defendants and Respondents.

Citation [Original].

United States of America,—ss.

The President of the United States, to Minidoka & Southwestern Railroad Company, the Utah Construction Company, and D. Worth Clark and P. L. Williams, their Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San

Francisco in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein the United States of America is plaintiff and you are defendants in error, to show cause if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH, Judge of the United States Circuit Court in and for the Central Division, District of Idaho, this 13 day of December, 1910.

FRANK S. DIETRICH,
Circuit Judge.

Service of the within Citation and receipt of a copy thereof admitted this 14th day of December, 1910.

P. L. WILLIAMS,
D. WORTH CLARK,
Attorneys for Defendants and Respondents.

[Endorsed]: No. 71. In the Circuit Court of the United States for the District of Idaho, Central Division. The United States of America, Complainant and Appellant, vs. Minidoka & Southwestern Railroad, a Corporation, and Utah Construction Company, a Corporation, Defendants and Appellees. Citation. Filed Dec. 16, 1910. A. L. Richardson, Clerk. B. E. Stoutemyer, Attorney, Boise, Idaho.

Return to Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

[Certificate of Clerk U. S. Circuit Court to Record.]

In the Circuit Court of the United States Ninth Judicial Circuit for the District of Idaho, Central Division.

THE UNITED STATES OF AMERICA,
Complainant and Appellant,
vs.
MINIDOKA & SOUTHWESTERN RAILWAY COMPANY (a Corporation) and UTAH CONSTRUCTION COMPANY (a Corporation),
Defendants and Appellees.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 124, inclusive, to be full, true and correct copies of the pleadings and proceedings, except the original exhibits, in the above-entitled cause, and that the same together constitute the transcript of

the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said Circuit Court, affixed at Boise, Idaho, this 22nd day of December, 1910.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1930. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. The Minidoka & Southwestern Railroad Company (a Corporation), and The Utah Construction Company (a Corporation), Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Idaho, Central Division.

Filed December 27, 1910.

F. D. MONCKTON,
Clerk.

MAPS

TOO

LARGE

FOR

FILMING

Plaintiff's Exhibit "B."

(Copy).

Railroad Crossings.

Rupert, Idaho, June 10, 1910.

Mr. R. B. Robinson, Asst. Engineer,
Oregon Shortline Railroad Company,
Twin Falls, Idaho.

Dear Sir:—Replying to your letter of June 8, transmitting plans for openings for canal and lateral crossings, Okaley branch, M. & S. W. R. R., I wish to say that we have examined the plans for the three bridges shown on drawings Nos. 14915 and 14921, and see no objection to them, provided the channel bents are boxed in, in accordance with our verbal agreement, and provided also that full twelve inch clearance is left between the bottom of the stringer and the water surface at the crossing of Canal H. I believe that this change can easily be made, in fact, it is my understanding that the grade is already built to conform with this condition.

Regarding the other structures; we have not yet had time to review the plans, but will do so at the earliest possible date, when I will advise you of any changes which we may wish to suggest.

Very truly yours,

_____,

Project Engineer.

(Copy).

Railroad crossing. #1602.

Rupert, Idaho, June 13, 1910.

Mr. R. B. Robinson,
Asst. Engineer,
Oregon Short Line R. R.,
Twin Falls, Idaho.

Dear Sir: Referring further to your letter of June 8th and supplementing mine of June 10th regarding canal and lateral crossings, Oakley branch, will say that we have examined the plans which you have submitted and find them satisfactory with very few exceptions. The culvert for the J–30 crossing we would like to have made at least two feet high so that it can be more easily cleaned out, if necessary. We would like to request also that trash racks be provided at the upper and lower ends of each syphon. On the syphons which we are building, we are using for this purpose the very cheap and simple wooden rack with rails 4 or 6 inches apart. These are for the purpose of keeping tumble weeds and similar trash out of the syphon.

We find that many of the water ways could be reduced in area and still be satisfactory, and the following suggestions are made for your consideration, with the idea that they may be acted upon or not as you see fit:

For the H–26 opening, the width might be reduced from 4–½ to 4 feet, and the height from 4½ to 3½/. For H–26–A, the width might be reduced from 3½ to 3 and the height from 3½ to 2½. For H–26–B the width might be reduced from 5½ to

4½/ For J–32–G the width might be reduced from 3½ to 2½, the height from 3 to 2½. For J–32–F the width might be reduced from 3½ to 3 and the height from 3½ to 2½. For J–32–Sta. 1003+37, the width might be reduced from 3½ to 2½ and the height from 3 to 2½. For J–32–E, the width might be reduced from 3½ to 2½, and the height from 3 to 2½. For J–32–B, the width might be reduced from 3½ to 2½ and the height from 3 to 2½. For J–32–Sta. 926+71, the width might be reduced from 6 to 5 ft.

In practically all cases of lateral crossings, where the angle of crossing is other than 90 degrees, I believe that if you desire the angle of skew can be reduced or entirely eliminated by changing the location of the lateral at the crossing. If this is done, the radius of curvature should be at least 6 or 7 times the surface width of water in the lateral.

If we were designing the structures, we should undoubtedly use much thinner sections, and re-enforced with steel. This, however, is simply a matter of preference.

I am returning the drawings herewith, as requested, and will ask you to send me a set of final plans for our files as soon as they have been definitely decided upon.

Very truly yours,

_____,

Project Engineer.

1 Copy to Supervising Engineer.

1 Copy of attached letter to Supervising Engineer.

Case No. 1930. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit "B." Received Dec. 27, 1910. F. D. Monckton, Clerk.

Defendants' Exhibit No. 1.

4—207 r.

M. L. 235083.
B.
M. F. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C.,
May 28, 1910.

I hereby certify that the annexed copies of papers are true and literal exemplifications of the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] H. W. SANFORD.
Recorder of the General Land Office.

In Reply Please Refer to Carson City 04063 MN.
3 Inc.
M. L. 227119-1 F. B. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C.,
January 14, 1910.

Address Only the
Commissioner of the General Land Office.

MINDORA & SOUTHWESTERN R. R. CO.:

Recommending acceptance of amendment to articles of incorporation and submitting three maps for approval.

The Secretary of the Interior.

Sir: The Minidoka and Southwestern Railroad Company has filed certified copy of an amendment to its articles of incorporation authorizing the construction of a branch line of its railroad in Nevada. It has also filed three maps in connection with its application for right of way under the provisions of the act of March 3, 1875 (18 Stat., 482) for sections of such road. These papers and the maps have been examined and found to conform to the regulations and the township plats. The land affected by the proposed right of way is not within the limits of any Government reservation, nor does it appear to be valuable for power sites.

I recommend, therefore, that the amendment to the articles of incorporation be accepted for filing, and that the maps herewith submitted be approved, subject to all valid existing rights.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved Jan. 17, 1910.

FRANK PIERCE,
First Assistant Secretary. FWC.

M. L. 227119-2

State of Nevada,
Department of State,—ss.

I, W. G. Douglass, the duly elected, qualified and acting Secretary of State of the State of Nevada, do hereby certify that "Minidoka and Southwestern Railroad Company" a corporation organized under the laws of the State of Idaho, did, on the third day

of December, 1909, file in my office, in compliance with statutes governing foreign corporations doing business in this State, a copy of its Articles of Incorporation, duly authenticated by the Secretary of the State of Idaho.

Furthermore that the said Railroad Company has filed a duly authenticated statement of Officers and Directors and the name of a Resident Agent upon whom process can be served, thereby conforming to all requirements of law so far as pertains to this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of State, at my office, in Carson City, Nevada, this third day of December, A. D. 1909.

[Seal]

W. G. DOUGLASS,
Secretary of State.
By J. W. Legate,
Deputy.

1482–1904. A. M.
L. & R. R. Div. A. M.

DEPARTMENT OF THE INTERIOR,
Washington.

M. L. 227119–3

J.I.P.

April 4, 1904.

The Commissioner of the General Land Office.

Sir: Under cover of a letter of the 29th ultimo to the Department you enclosed a certified copy of the articles of incorporation and proofs of organization of the Minidoka and Southwestern Railroad

Company under the corporation laws of the State of Idaho.

You reported that the papers conform to the regulations and recommended that they be accepted for filing under the Act of March 3, 1875—18 Stat., 482.

The papers are in satisfactory form, are hereby accepted for filing as recommended, and are enclosed for that purpose.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

3-357

(4-560.)
60828.

From Interior Department.
Sec.

Dated April 4, 1904.

Returns accepted, certified copy of articles of incorporation and proofs of organization of the Minidoka and Southwestern Railroad Company under the laws of the State of Idaho.

R. ofw. files.
April 11/04.

HORHLING,
Advd.
J. McK.

M. L. 227119-4.
Referred to Div. F.

McKINNEY.
55-162.

M. L. 227119-5
95603

Certificate of Certified Copy
[Vignette]

STATE OF IDAHO,
DEPARTMENT OF STATE.

I, ROBERT LANSDON, Secretary of the State of Idaho, do hereby certify that the annexed is a full, true and complete transcript of Certified Copies of Articles of Incorporation and Amendments thereto of the MINIDOKA & SOUTHWESTERN RAILROAD COMPANY which was filed in this department on January 20, 1904, March 9, 1908 and November 13, 1908, respectively, ~~Which was filed in this office the — day of — A. D. 1—~~, and admitted to record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State. Done at Boise City, the Capitol of Idaho, this fourteenth day of November, A. D. 1908.

[Seal] ROBERT LANSDON,
Secretary of State.

1.

M. L. 227119-6

ARTICLES OF INCORPORATION
OF THE
MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY.

State of Idaho,
County of Bannock,—ss.

We, the undersigned, one of whom is a resident of the State of Idaho, under and in pursuance of the

laws of said state, do hereby associate ourselves together for the purpose of creating a corporation with power to construct and own a railroad and franchise, as hereinafter provided, and do hereby agree to and adopt the following ARTICLES OF INCORPORATION.

Art. 1.

The name of this corporation shall be the "MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY."

Art. 2.

The purpose for which this corporation is organized is to construct, own, maintain, and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station, on the Oregon Short Line Railroad, in Section One (1) Township Eight (8) South, Range Twenty-five (25) East of Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) South, Range Thirteen (13) East of Boise Meridian, in Cassia County, in said State, a distance of eighty-

M. L. 227119–7

five miles, more or less. The total estimated length of said railroad and telegraph line is eighty-five miles, and the same will be situated within the count-

ties of Lincoln and Cassia in said state.

Art. 3.

The principal place of business of said corporation shall be Pocatello, in Bannock County, State of Idaho.

Art. 4.

This corporation shall exist for the period of fifty years from the date of its incorporation.

Art. 5.

There shall be the following officers of this corporation, to-wit: Five directors, a president, vice-president, secretary and treasurer, and the following are the names and residences of the directors and other officers who are hereby appointed for the first year and until their successors are duly elected and qualified.

Names.	Residences.
E. E. Calvin,	Salt Lake City, Utah.
William Ashton,	Salt Lake City, Utah.
T. M. Schumacher,	Salt Lake City, Utah.
D. E. Burley,	Salt Lake City, Utah.
E. C. Manson,	Pocatello, Idaho.

Directors.

E. E. Calvin,	President.
William Ashton,	Vice-President.
G. K. Smith,	Secretary.
C. H. Jenkinson,	Treasurer.

Art. 6.

The amount of the capital stock of this corporation

shall be eight hundred and fifty thousand dollars

($850,000.00), which shall be divided into eight thousand five hundred (8500) shares of one hundred dollars ($100.00) each.

Art. 7.

The amount of the capital stock of this corporation actually subscribed, names of subscribers and amount so subscribed are as follows, to wit:

E. E. Calvin, Trustee	$93,000.00
E. E. Calvin	100.00
William Ashton	100.00
T. M. Schumacher	100.00
D. E. Burley	100.00
E. C. Manson	100.00
	$93,500.00

WITNESS the signatures of the undersigned incorporators this 18th say of January, 1904.

E. E. CALVIN.
WILLIAM ASHTON.
T. M. SCHUMACHER.
D. E. BURLEY.
E. C. MANSON.

4.

M. L. 227119–9

State of Utah,
County of Salt Lake,—ss.

On this 18th day of January, 1904, before me, Charles D. Savery, a notary public, personally appeared E. E. Calvin, William Ashton, T. M. Schumacher, and D. E. Burley, severally known to me to be the persons whose *name* are subscribed to the fore-

going articles of incorporation and who severally acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year in this certificate above written.

[Seal] CHARLES D. SAVERY,
Notary Public.

My Commission expires Dec. 9th, 1904.

5.

M. L. 227119–10

State of Idaho,
County of Bannock,—ss.

On this 19th day of January, 1904, before me, J. J. Guheen, a notary public, personally appeared E. C. Manson, known to me to be one of the persons whose names are subscribed to the foregoing articles of incorporation and who acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year in this certificate above written.

[Seal] J. J. GUHEEN,
Notary Public.

My Commission expires Oct. 4th, 1904.

6.

M. L. 227119–11

State of Utah,
County of Salt Lake,—ss.

I, E. E. Calvin, being duly sworn, on oath depose and say that I am the president of the Minidoka and Southwestern Railroad Company, a corporation

under the laws of the State of Idaho. I further state that the amount of the capital stock of the said corporation required by law has been actually subscribed, being the amount of one thousand dollars per mile for each mile of the proposed railroad, and one hundred dollars per mile for each mile of the said telegraph line, and amounting in the aggregate to ninety-three thousand five hundred dollars ($93,500.00).

E. E. CALVIN.

Subscribed and sworn to before me this 18th day of January, 1904.

[Seal] CHARLES D. SAVERY,
Notary Public.

My Commission expires Dec. 9, 1904.

M. L. 227119–12

[Endorsed]:

State of Idaho,
County of Bannock,—ss.

I, E. G. Gallet, Clerk of the District Court, Ex-Officio Auditor and Recorder of Bannock County, Idaho, do hereby certify that the within and foregoing is a full, true and correct copy of the original Articles of Incorporation of Minidoka and Southwestern Railroad Company as shown by the records of my office.

Witness my hand and official seal this 19″ day of January, 1904.

[Seal] E. G. GALLET,
Clerk District Court, Ex-Officio Auditor and Recorder.

By D. N. Campbell,
Deputy.

2930.

CERTIFIED COPY OF ARTICLES OF INCORPORATION AND PRESIDENT'S CERTIFICATE OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY.

DEPARTMENT OF STATE,

Secretary's Office.

Filed this 20th day of January, 1904, at 3 o'clock P. M.

WILL H. GIBSON,
Secretary of State.

M. L. 227119–13

CERTIFICATE OF AMENDMENT OF ARTICLE II OF THE ARTICLES OF INCORPORATION OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY, A CORPORATION OF THE STATE OF IDAHO.

We, G. H. Olmstead, Chairman, and G. K. Smith, Secretary of the special meeting of the stockholders of the Minidoka and Southwestern Railroad Company, held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company, at Pocatello, Bannock County, Idaho, at ten o'clock A. M. on the 28th day of February, 1908, for the purpose of amending Article II of the Articles of Incorporation of the said Company, and W. H. Bancroft, D. E. Burley, E. C. Manson, and William Ashton, members, and constituting a majority of the Board of Directors of said corporation, do hereby certify: That on the 12th day of February,

1908, by a majority vote of the Board of Directors of said Minidoka and Southwestern Railroad Company, a corporation, at a meeting of said Board, duly called and held, a resolution was passed, authorizing and directing a special meeting of the stockholders of said corporation to be held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company at Pocatello, Bannock County, Idaho, at ten o'clock A. M., on the 28th day of February, 1908, for the purpose of amending Article II of the Articles of Incorporation of the said Company. That notice of the time and place of holding said stockholders' meeting, and the object thereof, was published in the Pocatello Tribune, a newspaper published at Pocatello, Bannock County, Idaho, where the principal place of business of said Minidoka and Southwestern Railroad Company is situated, for a period of more than two weeks prior to the said 28th day of February, 1908, the day fixed for said meeting. That said notice also contained a statement of the nature of the amendment proposed to said Article II of the Articles of Incorporation of said company.

That at the time and place specified in said notice, said stockholders' meeting was held. That of the shares of stock of said corporation issued and outstanding, there was present and represented at said meeting 934 shares, being all of the said shares so issued and outstanding, except one, and at said meeting all of said shares so present and represented voted in favor of the proposed amendment of said

Article II, and there were no votes cast against such amendment. That more than two-thirds of the entire capital stock of said Minidoka and Southwestern Railroad Company, so subscribed, issued and outstanding, voted in favor of the said amendment. That said amended article, as adopted at said meeting, is in the language following, to-wit:

ARTICLE II.

The purpose for which this corporation is organized is to construct, own, maintain and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station on the Oregon Short Line Railroad in Section One (1) Township Eight (8), South, Range Twenty-five (25) East of Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) south of Range Thirteen (13) East of Boise Meridian in Cassia County, in said State, a distance of eighty-five miles more or less. Also a branch line of railroad and telegraph line beginning at Rupert station, on the line above described, in Lincoln County, in said State, and extending thence in a westerly direction, passing Jerome townsite, thence northwesterly passing Wendell townsite, and continuing thence northwesterly to a junction with the Oregon Short Line Railroad, at or near Fuller station, in said Lincoln

M. L. 227119–15

County, a distance of seventy miles, more or less. The total estimated length of said main and branch line and telegraph is one hundred and fifty-five miles, and the whole thereof will be situated within the counties of Lincoln, Cassia and Twin Falls, in said State."

That G. H. Olmstead was Chairman of said stockholders' meeting, and G. K. Smith, was the Secretary thereof. That the undersigned W. H. Bancroft, D. E. Burley, E. C. Manson and William Ashton, are members of the Board of Directors of the Minidoka and Southwestern Railroad Company, and constitute a majority of said Board, the entire board consisting of five members.

Dated at Pocatello, Bannock County, Idaho, this 28th day of February, 1908.

G. H. OLMSTEAD,
Chairman.

W. H. BANCROFT,
WILLIAM ASHTON,
D. E. BURLEY,
E. C. MANSON,
Directors.

[Seal] Attest: G. K. SMITH,
Secretary.

State of Utah,
County of Salt Lake,—ss.

On this 2nd day of March, 1908, before me, L. B. Swaner, a Notary Public, in and for said County and State, personally appeared W. H. Bancroft and William Ashton, severally known to me to be two of

the persons whose names are subscribed to the foregoing certificate of amendment of the articles of incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the State of Idaho, who severally acknowledged to me that he executed the same for the uses and purposes therein contained, and that he does not wish to retract such execution.

M. L. 227119–16

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] L. B. SWANER,
Notary Public.

State of Idaho,
County of Bannock,—ss.

On this 6th day of March, 1908, before me, John Bunting, a Notary Public in and for said county and State, personally appeared G. H. Olmstead, known to me to be a *bona fide* resident of the State of Idaho, and the person whose name is subscribed to the foregoing certificate of amendment of the articles of incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the said State, and acknowledged to me that he executed the same for the uses and purposes therein contained, and that he does not wish to retract such execution.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] JOHN BUNTING,
Notary Public.

[Endorsed]:

M. L. 227119-17

State of Idaho,
County of Bannock,—ss.

I, E. G. Gallet, Clerk of the District Court, Ex-Officio Auditor and Recorder of Bannock County, Idaho, do hereby certify that the within and foregoing is a full, true and correct copy of the original Certificate of Amendment of Articles of Incorporation as shown by the records of my office.

Witness my hand and official seal this 7th day of March, 1908.

[Seal] E. G. GALLET,
Clerk District Court, Ex-Officio Auditor and Recorder.

By ————,
Deputy.

2930.

CERTIFICATE OF AMENDMENT OF ARTICLE II OF THE ARTICLES OF INCORPORATION OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY A CORPORATION OF THE STATE OF IDAHO.

DEPARTMENT OF STATE,

Secretary's Office.

Filed this 9th day of March, 1908, at 10 o'clock A. M. and Recorded in Book "X" of Dom. Corp'ns on page 48.

Records of the State of Idaho.

ROBERT LANSDON,
Secretary of State.

M. L. 227119–18

CERTIFICATE OF AMENDMENT OF ARTICLE II OF THE ARTICLES OF INCORPORATION OF THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, A CORPORATION OF THE STATE OF IDAHO.

We, W. H. Jones, Chairman, and G. K. Smith, Secretary of the special meeting of the stockholders of the Minidoka & Southwestern Railroad Company, held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company, at Pocatello, Bannock County, Idaho, at 10 o'clock A. M. on the 30th day of October, 1908, for the purpose of amending Article II of the Articles of Incorporation of the said company, and W. H. Bancroft, D. E. Burley, Wm. Ashton and J. M. Davis, members and constituting a majority of the board of directors of the said corporation do hereby certify that on the 13th day of October, 1908, by a majority vote of the board of directors of said Minidoka & Southwestern Railroad Company, a corporation, at a meeting of said board duly called and held, a resolution was passed authorizing and directing a special meeting of the stockholders of said corporation to be held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company, at Pocatello, Bannock County, Idaho, at 10 o'clock A. M., on the 30th day of October, 1908, for the purpose of considering and adopting an amendment to Article II of the Articles of Incorporation of the said company. That notice of the time and place of holding said stockholders' meeting and the

objects thereof was published at Pocatello, Bannock County, Idaho, where the principal place of business of said Minidoka & Southwestern Railroad Company is situated, for a period of two weeks prior to the said 30th day of October, 1908, the day fixed for said meeting.

That the said notice also contained a statement of the nature of the amendment proposed to said Article II of the Articles of Incorporation of said Company.

M. L. 227119–19

That at the time and place specified in said notice, said stockholders' meeting was held. That of the shares of stock of said corporation issued and outstanding there were present and represented at said meeting 849, being all of the said shares so issued and outstanding, except 1; and at said meeting all of said shares so present and represented voted in favor of the proposed amendment of the said Article II, and there were no votes cast against such amendment.

That more than two-thirds of the entire capital stock of the Minidoka and Southwestern Railroad Company so subscribed, issued and outstanding voted in favor of the said amendment. That said amended Article as adopted at said meeting is in the language following, to-wit:

"ARTICLE II.

"The purpose for which this corporation is organized is to construct, own, maintain and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed

desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station on the Oregon Short Line Railroad in Section One (1) Township Eight (8) South, Range Twenty-five (25) East of the Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) South of Range Thirteen (13) East of Boise Meridian, in Cassia County, in said State, a distance of eighty-five (85) miles more or less. Also a branch line of railroad and telegraph line beginning at Rupert station on the line above described, in Lin-

coln County, in said State, and extending thence in a westerly direction, passing Jerome townsite, thence northwesterly passing Wendell townsite, and continuing thence northwesterly to a junction with the Oregon Short Line Railroad, at or near Fuller station, in said Lincoln County, a distance of seventy (70) miles more or less.

Also a branch railroad line and telegraph line or extension of said railroad beginning at a point near Twin Falls station in Township Ten (10) South, Range Seventeen (17) East of the Boise Meridian, in Twin Falls County, State of Idaho, and extend-

ing thence in a southerly direction to a point on the state line between the states of Idaho and Nevada in the vicinity of range line between Ranges Fifteen (15) and Sixteen (16) East of the Boise Meridian in Twin Falls County, in said State, a distance of fifty-two (52) miles more or less; and thence continuing in a southerly direction along the Salmon River and Thousand Springs Summit to a connection with the Central Pacific Railway at a point between Moor and Valley Pass stations, in Elko County, State of Nevada, a distance of sixty-eight (68) miles more or less, and being a total length of one hundred twenty (120) miles more or less.

The total estimated length of said main and branch lines of railroad and telegraph lines is two hundred seventy-five (275) miles more or less, and the whole thereof will be situated within the counties of Lincoln, Cassia, and Twin Falls in the State of Idaho, and in Elko County in the State of Nevada."

That W. H. Jones was Chairman of said stockholders' meeting and G. K. Smith was the Secretary thereof.

That the undersigned, W. H. Bancroft, D. E. Burley, Wm. Ashton and J. M. Davis, are members of the Board of Directors of the Minidoka and South-

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western Railroad Company and constitute a majority of said board, the entire board consisting of five (5) members.

Dated at Pocatello, Bannock County, Idaho, this 30th day of October, 1908.

W. H. JONES,
Chairman.
W. H. BANCROFT,
D. E. BURLEY,
WM. ASHTON,
J. M. DAVIS,
Directors.

Attest:

G. K. SMITH.

State of Utah,
County of Salt Lake,—ss.

On this 5th day of November, 1908, before me, L. B. Swaner, a notary public in and for said county and state, personally appeared W. H. Bancroft, D. E. Burley, Wm. Ashton, and J. M. Davis, severally known to me to be the persons whose names are subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation in the State of Idaho, who severally acknowledged to me that they executed the same for the uses and purposes therein contained;

IN WITNESS WHEREOF I hereunto set my hand and affix my official seal the day and year first above written.

[Seal]

L. B. SWANER,
Notary Public.

State of Idaho,
County of Bannock,—ss.

On this 7th day of November, 1908, before me, D. W. Church, a notary public in and for said county and state, personally appeared W. H. Jones, known to me to be a resident of said county and state and

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the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the State of Idaho, who acknowledged to me that he executed the same for the uses and purposes therein contained.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] D. W. CHURCH,
Notary Public.

My Commission expires May 11th, 1912.

State of Utah,
County of Salt Lake,—ss.

I, G. K. Smith, being duly sworn, on oath depose and say that I am the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka & Southwestern Railroad Company, a corporation of the State of Idaho, as secretary of the meeting of the stockholders at which said amendment was adopted; and I further, on my oath, say that the said amendment, as signed, was duly adopted as therein

set forth by the stockholders of said company at said meeting.

G. K. SMITH.

Subscribed and sworn to this 5th day of November, 1908.

Witness my signature and official seal.

[Seal] L. B. SWANER,
Notary Public.

State of Idaho,
County of Bannock,—ss.

I, W. H. Jones, being duly sworn, on oath, depose and say that I am the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka &

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Southwestern Railroad Company, a corporation of the State of Idaho, as chairman.

I further state that I am a resident of said state and county, and that the said amendment, as set forth therein, was adopted by the vote of the stockholders of said company.

W. H. JONES.

Subscribed and sworn to this 7th day of November, 1908.

Witness my signature and official seal.

[Seal] D. W. CHURCH,
Notary Public.

[Indorsement]: 12382. Filed for record at the request of D. W. Clark at 50 minutes past 2 o'clock

P. M., this 7th day of Nov., 1908. Records of Bannock County, State of Idaho.

E. G. GALLET,
Recorder.

State of Idaho,
Bannock County,—ss.

I, E. G. Gallet, Recorder in and for said county, do hereby certify that the within and foregoing is a full, true and correct copy of the original Certificate of Amendment of Article II of the Articles of Incorporation of the Minidoka & Southwestern Railroad Company, a Corporation of the State of Idaho, as the same appears of record and on file in my office.

WITNESS my hand and official seal at Pocatello, Idaho, this 9th day of November, 1908.

[Seal] E. G. GALLET,
Recorder.

M. L. 227119-24

[Endorsed]:

AMENDMENT TO ARTICLE 2, MINIDOKA & SOUTHWESTERN RAILROAD CO.

DEPARTMENT OF STATE,
Secretary's Office,

Filed this 13th day of November, 1908, at 10 o'clock A. M. and Recorded in Book Y of Dom. Corpns. on page ——.

Records of the State of Idaho.

ROBERT LANSDON,
Secretary of State.

M. L. 227119

CERTIFICATE OF CERTIFIED COPY.

STATE OF IDAHO.

OFFICE OF THE SECRETARY OF STATE.

I, WILL H. GIBSON, Secretary of the State of Idaho, do hereby certify that the annexed is a full, true and complete transcript of

CERTIFIED COPY OF ARTICLES OF INCORPORATION OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY.

Which was filed in this office the 30th day of January, A. D. 1904, and admitted to record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State. Done at Boise City, the Capital of Idaho, this 20th day of January, A. D. 1904.

[Seal] WILL H. GIBSON,
Secretary of State.

ARTICLES OF INCORPORATION
OF THE
MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY.

State of Idaho,
County of Bannock,—ss.

We, the undersigned, one of whom is a resident of the State of Idaho, under and in pursuance of the laws of the state, do hereby associate ourselves together for the purpose of creating a corporation with power to construct and own a railroad and franchise, as hereinafter provided, and do hereby agree to and adopt the following

ARTICLES OF INCORPORATION.

ART. 1.

The name of this corporation shall be the

"MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY."

ART. 2.

The purpose for which this corporation is organized is to construct, own, maintain, and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station, on the Oregon Short Line Railroad, in Section One (1) Township Eight (8) South, Range Twenty-Five (25) East of Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) South, Range Thirteen (13) East of Boise Meridian, in Cassia County, in said state, a distance of eighty-five miles, more or less. The total estimated length of said railroad and telegraph line is eighty-five miles, and the same will be situated within the counties of Lincoln and Cassia in said state.

ART. 3.

The principal place of business of said corporation shall be Pocatello, in Bannock County, State of Idaho.

ART. 4.

This corporation shall exist for the period of fifty years from the date of its incorporation.

ART. 5.

There shall be the following officers of this corporation, to wit: Five directors, a president, vice-president, secretary and treasurer, and the following are the names and residences of the directors and other officers who are hereby appointed for the first year and until their successors are duly elected and qualified.

Names.	Residences.
E. E. Calvin,	Salt Lake City, Utah,
William Ashton,	Salt Lake City, Utah,
T. M. Schumacher,	Salt Lake City, Utah,
D. E. Burley,	Salt Lake City, Utah,
E. C. Manson,	Pocatello, Idaho,

Directors.

E. E. Calvin,	President.
William Ashton,	Vice-president.
G. K. Smith,	Treasurer.
C. H. Jenkinson,	Secretary.

ART 6.

The amount of the capital stock of this corporation shall be eight hundred and fifty thousand dollars ($850,000.00), which shall be divided into eight thousand five hundred (8500) shares of one hundred dollars (100.00) each.

ART. 7.

The amount of the capital stock of this corpora-

tion actually subscribed, names of subscribers and amount so subscribed, are as follows, to wit:

E. E. Calvin, Trustee	$93,000.00
E. E. Calvin	100.00
William Ashton	100.00
T. M. Schumacher	100.00
D. E. Burley	100.00
E. C. Manson	100.00
	$93,500.00

WITNESS THE signatures of the undersigned incorporators this 18th day of January, 1904.

E. E. CALVIN.
WILLIAM ASHTON.
T. M. SCHUMACHER.
D. E. BURLEY.
E. C. MANSON.

State of Utah,
County of Salt Lake,—ss.

On this 18th day of January, 1904, before me, Charles D. Savery, a notary public, personally appeared E. E. Calvin, William Ashton, T. M. Schumacher, and D. E. Burley, severally known to me to be the persons whose *name* are subscribed to the foregoing articles of incorporation and who severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and official seal the day and year in this certificate above written.

[Seal] CHARLES D. SAVERY,
Notary Public.

My Commission expires Dec. 9th, 1904.

State of Idaho,
County of Bannock,—ss.

On this 19th day of January, 1904, before me, J. J. Guheen, a notary public, personally appeared E. C. Manson, known to me to be one of the persons whose names are subscribed to the foregoing articles of incorporation and who acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and official seal the day and year in this certificate above written.

[Seal] J. J. GEHEEN,
Notary Public.

My Commission Expires Oct. 4th, 1904.

State of Idaho,
County of Bannock,—ss.

I, E. G. Gallet, Clerk of the District Court, Ex-officio Auditor and Recorder of Bannock County, Idaho, do hereby certify that the within and foregoing is a full, true and correct copy of the original Articles of Incorporation of Minidoka and Southwestern Railroad Company as shown by the records of my office.

Witness my hand and official seal this 19th day of January, 1904.

[Seal] E. G. GALLET,
Clerk District Court, Ex-officio Auditor and Recorder.

By D. N. Campbell,
Deputy.

E. E. Calvin, President.
William Ashton, Vice-president.
G. K. Smith, Secretary.
C. H. Jenkinson, Treasurer.

[Seal] E. E. CALVIN.

Subscribed and sworn to before me this sixth day of February, 1904.

[Seal] CHAS. D. SAVERY,
Notary Public.

M. L. 227119.

CERTIFICATE OF INCORPORATION—DOMESTIC CORPORATION.

STATE OF IDAHO.

OFFICE OF THE SECRETARY OF STATE.

I, Will H. Gibson, Secretary of State, of the State of Idaho, do hereby certify that a certified copy of the Articles of Incorporation of

MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY,

duly certified by the Recorder of Bannock County, to be a true copy of the original Articles, was filed in this office on the 20th day of January, A. D., One Thousand Nine Hundred and four, and is duly recorded in Book ——— Domestic Incorporations, Records of the State of Idaho, which Articles contained the statement of facts required by law, to wit:

First, The name of the Corporation as aforesaid; Second, the purpose for which it was framed; Third, The place where its principal business is to be transacted; Fourth, The term for which it is to exist; Fifth, the number of its directors, or its trustees,

and the names, residences and term of office of those who are appointed for the first year; Sixth, The amount of its capital stock and the number of shares into which it is divided; Seventh, The amount of its capital stock actually subscribed and by whom.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Idaho, Done at Boise City, the Capital, this 20th day of January in the year of our Lord One Thousand Nine Hundred and four and of the Independence of the United States of America the One Hundred and twenty-eighth.

[Seal] WILL H. GIBSON,
Secretary of State.

Section 2086. Private corporations may be formed by the voluntary association of any five or more persons in the manner prescribed in this title. Provided one of such persons must be a *bona fide* resident of this State.

Section 2087. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

Section 2088. The instrument by which a private corporation is formed, is called "Articles of Incorporation."

Section 2089. Articles of incorporation must be prepared setting forth:

First. The name of the corporation.

Second. The purpose for which it is formed.

Third. The place where its principal business is to be transacted.

Fourth. The term for which it is to exist, not ex-

ceeding fifty years.

Fifth. The number of its directors or trustees; and the names and residences of those who are appointed for the first year; Provided, at any time during the existence of the corporation, the number of the directors may be increased, in corporations for profit, by a majority of the stockholders of the corporation, to any number not exceeding eleven, who must be members of the corporation, whereupon a certificate, stating the number of directors, must be filed, as provided for the filing of the original articles of incorporation.

Sixth. The amount of the capital stock, and the number of the shares into which it is divided.

Seventh. If there is a capital stock, the amount actually subscribed and by whom.

Section 2090. The articles of incorporation of any railroad, wagon road or telegraph organization must also state:

First. The kind of road or telegraph intended to be constructed.

Second. The place from and to which it is intended to be run, and all of the intermediate branches.

Third. The estimated length of the road or telegraph line.

Section 2091. The articles of incorporation must be subscribed by five or more persons, one or more of whom must be resident freeholders of this State, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property.

Section 2092. Each intended railroad, wagon road or telegraph corporation, before filing articles of incorporation, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amount, to wit:

First. One thousand dollars per mile of railroads.

Second. One hundred dollars per mile of telegraph lines.

Third. Three hundred dollars per mile of wagon roads.

Section 2093. Before the Secretary of State or the Recorder of the county issued to any such corporations a certificate of the filing of articles of incorporations, there must be filed in his office an affidavit of the president, Secretary or treasurer named in the articles that the amount of the capital stock thereof required by law has been actually subscribed.

Section 2094. Upon filing the articles of incorporation in the office of the County Recorder of the county in which the principal business of the company is to be transacted, and a copy thereof certified by the County Recorder, with the Secretary of State, and filing the affidavit mentioned in the last section, when such affidavit is required, the Secretary of State or such County Recorder must issue to the corporation, over his official seal, a certificate that a copy of the articles, containing the required statement of facts, has been filed in his office; and thereupon the persons executing the articles and their associates and successors shall be a body politic and corporate, by the name stated in the articles, and for

the term of fifty years, unless it is in the articles of incorporation otherwise stated, or by law otherwise specially provided.

CERTIFICATE.

DEPARTMENT OF STATE.

STATE OF IDAHO.

I, Will H. Gibson, Secretary of State of the State of Idaho, do hereby certify that the above and foregoing is a true and correct copy of Sections 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093 and 2094 of the Civil Code of the State of Idaho, 1901; I further certify that the foregoing was on January 20th, 1904, and still is all the Statute law of the State of Idaho touching upon the organization of domestic corporations; and that the articles of incorporation of the Minidoka and Southwestern Railroad Company have been filed according to law.

In Witness Whereof, I have hereunto set my hand and caused to be affixed the Great Seal of the State.

Done at Boise, the Capitol, this 9th day of February, in the year of our Lord one thousand nine hundred and four, and of the Independence of the

United States of America the one hundred and twenty-eighth.

[Seal] WILL H. GIBSON,
Secretary of State.

PRD

37975

Advising MN.

In Reply Please Refer to 10–37975 "F" MN
MN.

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE,

Washington, May 8, 1910.

M. L. 235083.

Address only the Commissioner of
the General Land Office.

MINIDOKA & SOUTHWESTERN R. R. CO.—Recommending acceptance of amended articles of incorporation.

The Secretary of the Interior.

Sir: Local counsel for the Minidoka and Southwestern Railroad Company has filed certified copy of amended articles of incorporation of said company under the provisions of the act of March 3, 1875. The certified copy of the original articles was accepted by you April 4, 1904. The amended articles have been examined and found to be in approved form. I recommend therefore that they be accepted for filing under the provisions of said act.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved May 18, 1910.

FRANK PIERCE,
First Assistant Secretary.

GHM FWC

[Stamped]: Received May 19, 1910. G. L. O.
No Enc. H. F. C.
Received May 20, 1910.
Returned to ————.
Assigned to ————.
Answered by ————.
————Noted ————.
File
5/ /10 To Horkling

CERTIFICATE OF CERTIFIED COPY.

M. L. 235083–2.
37975

[Vignette.]

STATE OF IDAHO,

DEPARTMENT OF STATE.

I, Robert Lansdon, Secretary of State of the State of Idaho, do hereby certify that the annexed is a full, true and complete transcript of certified copy of amended Articles of Incorporation of the

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY,

Which was filed in this office the Twenty-sixth day of July, A. D. 1909, and admitted to record.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State. Done

at Boise City, the Capital of Idaho, this Twenty-sixth day of July, A. D. 1909.

[Seal] ROBERT LANSDON,
Secretary of State.

M. L. 235083–2.

CERTIFICATE OF AMENDMENT OF ARTICLE II OF THE ARTICLES OF INCORPORATION OF THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, A CORPORATION OF THE STATE OF IDAHO.

We, W. H. Jones, Chairman, and C. K. Smith, Secretary, of the special meeting of the stockholders of the Minidoka & Southwestern Railroad Company, held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company at Pocatello, Bannock County, Idaho, at ten A. M. on the 12th day of July, 1909, for the purpose of amending Article II of the Articles of incorporation of said company and W. H. Bancroft, D. E. Burley, William Ashton and J. M. Davis, members and constituting a majority of the Board of Directors of said corporation, do hereby certify that on the 24th day of June, 1909, by a majority vote of the Board of Directors of said Minidoka & Southwestern Railroad Company, a corporation, at a meeting of said Board duly called and held, a resolution was passed authorizing and directing a special meeting of the stockholders of said corporation to be held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company at Pocatello, Bannock County, Idaho, at ten o'clock A. M. on the 12th day of July, 1909, for the

purpose of considering and adopting an amendment to article II of the articles of incorporation of the said company. That notice of the time and place of holding said stockholders' meeting and the objects thereof was published at Pocatello, Bannock County, Idaho, where the principal place of business of said Minidoka & Southwestern Railroad Company is situated, for a period of two weeks prior to said 12th day of July, 1909, the day fixed for said meeting. That the said notice also contained a statement of the nature of the amendment proposed to said article II of the articles of incorporation of said company.

That at the time and place specified in said notice said stockholders' meeting was held. That of the shares of stock of said corporation issued and outstanding there were present and represented at said

meeting 849 shares, being all of the said shares so issued and outstanding except one; and at said meeting all of the said shares so present and represented voted in favor of the proposed amendment of said article II, and there were no votes cast against such amendment. That more than two-thirds of the entire capital stock of the Minidoka & Southwestern Railroad Company so subscribed, issued and outstanding voted in favor of the said amendment. That said amended article as adopted at said meeting is in the language following, to wit:

"ARTICLE II.

"The purpose for which this corporation is organized is to construct, own, maintain and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station on the Oregon Short Line Railroad in Section One (1), Township Eight (8) South, Range Twenty-five (25), East of the Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) South of Range Thirteen (13) East of Boise Meridian, in Cassia County, in said State, a distance of eighty-five (85) miles more or less. Also a branch line of railroad and telegraph line beginning at Rupert station, on the line above described, in Lincoln County, in said State, and extending thence in a westerly direction, passing Jerome townsite, thence northwesterly passing Wendell townsite, and continuing thence northwesterly to a junction with the Oregon Short Line Railroad, at or near Fuller station, in said Lincoln County, a distance of seventy (70) miles more or less. Also a branch railroad line and telegraph line or extension of said railroad beginning at a point near Twin Falls station in Township Ten (10) South, Range seventeen (17) East of the Boise Meridian, in Twin Falls County, State of Idaho, and extending thence in a southerly direction to a point on the state line

between the station of Idaho and Nevada in the vicinity of range line between Ranges Fifteen (15) and Sixteen (16) East of the Boise Meridian, in Twin Falls County, in said State, a distance of fifty-two (52) miles more or less; and thence continuing in a southerly direction along the Salmon River and Thousand Springs Summit to a connection with the Central Pacific Railway at a point between Moor and Valley Pass stations, in Elko County, State of Nevada, a distance of sixty-eight (68) miles more or less, and being a total length of one hundred twenty (120) miles more or less. Also to construct, own, maintain and operate an extension of its main line of railroad from the end of its present operated main line near Buhl station in a westerly and northwesterly direction through Twin Falls, Owyhee and Canyon Counties, in the State of Idaho, to a point on the State line between the States of Idaho and Oregon, in or near Section 11, Township 4, North Range 6 West of the Boise Meridian, in said Canyon County, thence continuing in a *northly* direction to a connection with the present operated Oregon Short Line Railroad at or near Nyssa station, in Malheur County, Oregon, a distance of One Hundred Seventy Five (175) miles, more or less. Also a branch line from said main line, commencing at a point in or near Section 9, Township 10 South, Range 13 East of the Boise Meridian, in said Twin Falls County, and extending thence in a northwesterly direction through Twin Falls, Owyhee and Elmore Counties, in said State of Idaho, to a con-

3.

M. L. 235083–4

nection with the present operated Oregon Short Line Railroad at or near Glenn's Ferry station, a distance of Thirty-four (34) miles, more or less. Also a branch line of railroad commencing at a point on the present operated main line of said railroad at or near Burley station, in Section 20, Township 10 South, Range 23 East of the Boise Meridian, thence in a southerly direction to a point at or near the town of Oakley, in Township 14 South, Range 22 East of the Boise Meridian, a distance of Twenty-five (25) miles, more or less, and situated in Cassia County, in said State of Idaho, also to authorize the construction by the said company of telegraph and telephone lines along its main and branch lines and to authorize it to operate its trains upon all or any portion of its said lines by steam or electrical power, as it may from time to time determine. The total estimated length of said main and branch lines of said railroad and telegraph lines is five hundred (500) miles, more or less, and the whole thereof will be situated within the counties of Lincoln, Cassia, Twin Falls, Owyhee and Canyon, in the State of Idaho, in Elko County, in the State of Nevada and Malheur County, in the State of Oregon."

That W. H. Jones was Chairman of said stockholders' meeting and G. K. Smith was Secretary thereof.

That the undersigned, W. H. Bancroft, D. E. Burley, Wm. Ashton, and J. M. Davis, are members of the Board of Directors of the Minidoka and Southwestern Railroad Company and constitute a major-

ity of said board, the entire board consisting of five (5) members.

Dated at Pocatello, Bannock County, Idaho, this 12th day of July, 1909.

W. H. JONES,
Chairman.
W. H. BANCROFT,
D. E. BURLEY,
J. M. DAVIS,
WM. ASHTON,
Directors.

[Seal] Attest: G. K. SMITH,
Secretary.

4.

M. L. 235083–5.

State of Utah,
County of Salt Lake,—ss.

On this 19th day of July, 1909, before me, L. B. Swaner, a notary public in and for said county and state, personally appeared W. H. Bancroft, D. E. Burley, Wm. Ashton, and J. M. Davis, severally known to me to be the persons whose names are subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation in the State of Idaho, who severally acknowledged to me that they executed the same for the uses and purposes therein contained.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] L. B. SWANER,
Notary Public.

State of Idaho,
County of Bannock,—ss.

On this 20th day of July, 1909, before me, D. W. Church, a notary public in and for said county and state, personally appeared W. H. Jones, known to me to be a resident of said ~~county~~ and state and the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the State of Idaho, who acknowledged to me that he executed the same for the uses and purposes therein contained.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] D. W. CHURCH,
Notary Public.

State of Utah,
County of Salt Lake,—ss.

I, G. K. Smith, being duly sworn, on oath depose and say that I am the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the State of Idaho, as Secretary of the meeting of the stockholders at which said amendment was adopted; and I further, on my oath, say that the said amendment, as signed, was duly adopted as therein set forth by the stockholders of said company at said meeting.

G. K. SMITH.

Subscribed and sworn to this 15th day of July, 1909. Witness my signature and official seal.

[Seal] L. B. SWANER,
Notary Public.

5.

M. L. 235083-6.

State of Idaho,
County of Bannock,—ss.

I, W. H. Jones, being duly sworn, on oath, depose and say that I am the same person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka & Southwestern Railroad Company, a corporation of the State of Idaho, as chairman. I further state that I am a resident of said state ~~and county~~, and that the said amendment, as set forth therein, was adopted by the vote of the stockholders of said company.

W. H. JONES.

Subscribed and sworn to this 20th day of July, 1909. Witness my signature and official seal.

[Seal] D. W. CHURCH,
Notary Public.

[Endorsed]:

AMENDMENT TO ARTICLES INCORPORATION OF MINIDOKA & SOUTHWESTERN RAILROAD COMPANY.

DEPARMENT OF STATE,

Secretary's Office.

Filed this 26 day of July, 1909, at 10 o'clock A. M. and Recorded in Book Z of Dom. Corpn. on page —— Records of the State of Idaho.

ROBERT LANSDON,
Secretary of State.

State of Idaho,
County of Bannock,—ss.

I, E. G. Gallett, recorder in and for said County hereby certify that the within and foregoing is a full, true and correct copy of the Original Certificate of Amendment of Article II of the Articles of Incorporation of the Minidoka and Southwestern Railway Company, as the same appears on file in my office, as filed this 20th day of July, 1909.

Witness my hand and official seal this 20th day of July, 1909.

[Seal]

E. G. GALLETT,
Recorder.
By W. A. Hyde,
Deputy.
M. L. 235083–7.

[Endorsed]: Defendants' Ex. 1. U. S. Cause No. 71. Filed June 18, 1910. A. L. Richardson, Clerk.

Case No. 1930. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit "1." Received Dec. 27, 1910. F. D. Monckton, Clerk.

State of Utah,
County of Salt Lake,—ss.

I, E. E. Calvin, being duly sworn, on oath depose and say that I am the president of the Minidoka and Southwestern Railroad Company, a corporation under the laws of the State of Idaho. I further state that the amount of the capital stock of the said corporation required by law has been actually subscribed, being the amount of one thousand dollars per mile for each mile of proposed railroad, and one hundred dollars per mile for each mile of the said telegraph line, and amounting in the aggregate to ninety-three thousand five hundred dollars ($93,500.00).

E. E. CALVIN.

Subscribed and sworn to before me this 18th day of January, 1904.

[Seal] CHARLES D. SAVERY,
Notary Public.

My Commission expires Dec. 9, 1904.

[Endorsed]:

CERTIFIED COPY OF ARTICLES OF INCORPORATION AND PRESIDENT'S CERTIFICATE OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY.

DEPARTMENT OF STATE,
Secretary's Office.

Filed this 20th Day of January, 1904, at 3 o'clock P. M.

WILL H. GIBSON,
Secretary of State.

SECRETARY'S CERTIFICATE.

I, G. K. Smith, Secretary of the Minidoka and Southwestern Railroad Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State of Idaho, and that the copy of the articles of incorporation of the company filed with the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company this sixth day of February, 1904.

[Seal] G. K. SMITH,
Secretary of the Minidoka and Southwestern Railroad Company.

State of Utah,
County of Salt Lake,—ss.

E. E. Calvin, being duly sworn, says, that he is the President of the Minidoka and Southwestern Railroad Company, and that the following is a true list of the officers of said company, with the full name and official designation of each, to wit:

E. E. Calvin,	of Salt Lake City, Utah,
William Ashton,	of Salt Lake City, Utah,
T. M. Schumacher,	of Salt Lake City, Utah,
D. E. Burley,	of Salt Lake City, Utah,
E. C. Manson,	of Pocatello, Idaho.

Directors.

POOR COPY

MAPS TOO LARGE FOR FILMING

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation) and The Utah Construction Company (a Corporation), Appellees.

Certificate of Clerk, U. S. Circuit Court of Appeals, to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and one (201) pages, numbered from and including one (1) to and including two hundred and one (201), to be a full, true and correct copy of the Printed Transcript of Record upon appeal from the United States Circuit Court for the District of Idaho, Central Division, in the above-entitled case, as the original thereof remains on file and of record in my office, the said copy having been printed under my supervision pursuant to the provisions of the twenty-third rule of the Rules of Practice of the said Circuit Court of Appeals.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of December, A. D. 1911.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation) and The Utah Construction Company (a Corporation), Appellees.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

(Addenda.)

* * * * * * *

At a Stated Term, To-wit, the October Term, A. D. 1910, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Court-Room in the City and County of San Francisco, on Wednesday, the Fifteenth Day of February, in the Year of Our Lord One Thousand Nine Hundred and Eleven.

Present:

Honorable William B. Gilbert, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.
Honorable Charles F. Wolverton, District Judge.

Thereupon the following proceedings were had:

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, a Corporation, et al., Appellees.

Order of Submission.

Ordered, appeal in the above-entitled cause argued by Messrs. B. F. Stoutemyer, and United States Attorney C. H. Lingenfelter, counsel for the appellant, and by Mr. P. L. Williams, counsel for the appellees, and submitted to the Court for consideration and decision.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation) and The Utah Construction Company (a Corporation), Appellees.

Opinion U. S. Circuit Court of Appeals.

Appeal from the United States Circuit Court for the District of Idaho, Central Division.

In Equity.

Action on the Part of the United States to Restrain the Defendants from Going upon Certain Reserved Lands, Withdrawn for the Purpose of Irrigation and Reclamation under the Act of Congress of June 17, 1902 (32 Stat., 388), and Cutting up said Lands with Embankments, Cuts, Fills, and Borrow-pits for a Line of Railroad, and from Constructing a Railroad along said Line Without the Approval and in Violation of the Alleged Rights of the Complainant.

C. H. Lingenfelter, U. S. Attorney; B. E. Stoutemyer, for appellant.
P. L. Williams, D. Worth Clark, for appellees.

Before Gilbert and Morrow, Circuit Judges, and Wolverton, District Judge.

MORROW, *Circuit Judge:*

The question involved in this case is whether the defendant, the Minidoka & Southwestern Railroad Company has acquired a right of way for a line of railroad over certain lands reserved and with-

drawn for public entry for the purpose of reclamation and irrigation under the Act of June 17, 1902 (32 Stat. 388).

The Act provides for the sale and disposal of public lands in certain western states, including the State of Idaho, and appropriating the receipts from such sale to the construction of irrigation works for the reclamation of arid lands.

For the purpose of carrying out this project the Act authorizes the Secretary of the Interior to withdraw public lands from entry for two specific purposes:

1st. Lands acquired for any irrigation works contemplated under the provisions of the Act.

2nd. Lands believed to be susceptible of irrigation from said works.

The Secretary of the Interior has designated withdrawals of the lands required for irrigation works as: "Withdrawals under the first form," and withdrawals of lands believed to be susceptible of irrigation from said works as: "Withdrawals under the second form." Instruction of June 6, 1905 (33 L. D. 607).

The lands withdrawn under the first form cannot be entered, selected or located in any manner so long as they remain so withdrawn. Lands withdrawn under the second form can be entered only under the homestead laws, and subject to the provisions, limitations, charges, terms and conditions of the Reclamation Act. Under the power conferred by this Act the Secretary of the Interior, by order dated November 12, 1902, withdrew from entry the lands described in the bill of complaint as part of the Minidoka project in the state of Idaho. The withdrawal of these lands was under the second form which does not exclude entries under the homestead laws, but such homestead entries are made subject to all provisions, limitations, charges, terms and conditions of the Act. These provisions, limitations, etc. may be briefly summarized as follows:

1. The entries are not subject to the commutation provisions of the homestead laws.

2. The Secretary of the Interior is required to limit the area per entry. The entry shall be not less than forty nor more than one hundred sixty acres, and shall represent the acreage which in the opinion of the Secretary may be reasonably required for the support of a family upon the land in question. This area is designated by the Secretary as the "farm unit."

3. Before the entryman shall be entitled to a patent for the lands described in his entry he must show that he has reclaimed at least one-half of the total irrigable area of his entry for agricultural purposes.

4. Before a patent will issue he must also show that he has paid the entire apportioned water charges fixed by the Secretary of the Interior in not more than ten annual payments.

5. No water right permanently attaches until all payments therefor are made.

6. A failure to make any two payments when due render- the entry subject to cancellation, with a forfeiture of all rights under the Act, as well as all money paid thereon.

7. Water service to not more than one hundred and sixty acres of one owner.

8. Water service only to owners resident on or in the vicinity of the land.

The Minidoka Project provides for the diversion of the waters of Snake River by gravity and by pumping for the irrigation and reclamation of certain arid lands lying north and south of the river in Lincoln and Cassia Counties, in the State of Idaho. The lands involved in this case lie south of the river in Cassia County, and form part of the south side Minidoka Pumping Project, upon which the United States has expended a sum of money in excess of $1,300,000 in the construction of irrigation works consisting of a pumping plant, numerous canals, laterals and irrigation ditches for the irrigation of such lands. The defendant railroad company has projected a line of road connecting with an existing line at the town of Burley, on the south side of Snake River, and running south from Burley to the town of Oakley, a distance of about 20 miles. For the distance of about six miles south from Burley the projected road traverses lands which have been entered as homesteads within the area of the South Side Minidoka Pumping Project. The line of road over these lands will, when constructed, cross three of the main canals and ten of the laterals constructed and operated by the Reclamation Service. The defendant railroad company claims to have acquired the right of way for its railroad over these lands under and by virtue of the Act of March 3, 1875, entitled: "An Act granting to railroads the right of way through public lands of the United States," approved March 3, 1875 (18 Stat. 482), and by contracts with homestead entrymen (with two exceptions) granting to the railroad company the right to construct its railroad over and across said lands. With respect to the two exceptions for which no contracts have been made, the railroad company represents that it will obtain such contracts before extending its line of road over said lands.

Has the railroad company acquired a right of way under the Act of March 3, 1875? A fundamental rule of construction for such a grant has long been established. This rule requires the Courts to construe the grant strictly in favor of the public; nothing passes but what is granted in clear and explicit terms. Sutherland, Stat. Const. §548. Holyoke Co. v. Lyman, 15 Wall. 500, 511. The Act grants a right of way through the "public lands of the United States." The first question is: Are these entered lands "public lands of the United States"? In Wiona & St. Paul R. R. Co. v. Barney, 113 U. S. 618, 624, the Supreme Court had before it a controversy respecting rights under grants to certain railroad companies. The Court said with respect to the construction of these grants:

"The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when

the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

In United States v. Blendaur, 128 Fed. 910, 913, this Court said:

"The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results."

If we look at the several provisions of this Act we find that it includes as "public lands" not only lands to which no claims or rights have attached, but specifically includes lands to which possessory claims have attached, for in section 3 it is provided that the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned.

It is further provided that: "Where such provision shall not have been made, such condemnation may be made in accordance with section three of the act approved July 2, 1864."

That is to say, the act grants the right of way through the public lands of the United States, and if upon any of the public lands through which a right of way is required there is a possessory claim the railroad company can proceed to acquire a right of way from that claim in the manner specified. But for the purpose of the Act the mere possessory right of the settler does not remove the land from the legal classification as "public lands of the United States," and the homestead settler under the provisions of the Reclamation Act has certainly nothing more than a possessory right prior to the time when he shall have paid for the land and for the water charges as provided in the Act.

In the present case none of the homestead entrymen have made final proof or received a final certificate or a patent for the land. Neither have they or any of them repaid the United States for any part or installment of the cost of construction of said reclamation project. These claims are, therefore, nothing more than possessory; and the lands to which they relate, public lands of the United States.

But it is contended on the part of the United States that no right of way can be acquired by the railroad company over the lands included in the reclamation project under the act of March 3, 1875, for the reason that they had been previously withdrawn under the second form authorized by the Reclamation Act for the accomplishment of a governmental purpose authorized by law and were excluded from railroad appropriation by section 5 of that Act which provides:

"This Act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale."

The contention is that lands withdrawn under the second form of the Reclamation Act are "specially reserved from sale." We cannot agree to this construction of the Act. It seems to us to provide directly to the contrary. The title of the Act is: "An Act appropriating the receipts from the sale and disposal of public lands

in certain states and territories to the construction of irrigation works for the reclamation of arid lands." One of the stipulations in the record of this case is that "all the lands under said Minidoka Project and the extension thereof are arid in character and require irrigation to produce agricultural crops thereon, but are productive when irrigated." Being arid lands they are not salable in their natural condition, but a system of reclamation and irrigation is provided by the act to make the lands salable, and, being salable, they are offered for sale. They are not specially or otherwise reserved from sale, but are offered for sale under specified conditions. It follows that the Act of March 3, 1875, "granting to railroads the right of way through the public lands of the United States," is applicable to these lands. But there is another statute, the counterpart of the Act of March 3, 1875, under which so much of the possessory right of the settler as may be required can be obtained by the railroad company. This statute is section 2288 of the Revised Statutes, as amended by section 3 of the act of March 3, 1891 (26 Stats. 991), which is as follows:

"Any bona fide settler under the preemption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim."

These two statutes taken together appear to meet the requirements of the situation, and to authorize the railroad company upon complying with certain conditions to acquire from both the government and the settler a right of way which the government should not in justice to the settler grant without his consent, and which the settler could not convey without the permission of the government, since he can only "transfer by warranty against his own acts."

It appears from the record that the railroad company has acquired by contract the right of way for its railroad over all the lands held by the homestead entrymen except two; and with respect to these two it is conceded that the railroad company must obtain such an agreement with the entrymen before extending its line of road over their lands.

The right of way also passes through a section of school lands (section 36), which has passed to the State of Idaho. With respect to these lands the railroad company holds contracts for a right of way with parties to whom the State of Idaho has conveyed or contracted to convey said lands.

This brings us to the consideration of the conditions under which a railroad company may obtain a grant of a right of way over the public lands of the United States.

These conditions are specified in the Act of March 3, 1875. Section 1 provides:

"That the right of way through the public lands of the United States is hereby granted to any railroad company * * * which shall have filed with the Secretary of the Interior a copy of its articles

of incorporation, and due proofs of its organization, * * * to the extent of one hundred feet on each side of the central line of said road."

Section 4 provides:

"That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The defendant railroad in this case filed with the Secretary of the Interior a copy of its Articles of Incorporation and due proofs of its organization under the same, but has filed no profile map of its road with the register of the land office where the land is located, and no such profile map has been filed with or approved by the Secretary of the Interior. It is contended by the railroad company that, having filed with the Secretary of the Interior a copy of its Articles of Incorporation and due proofs of its organization under the same, it has placed itself in a position to become a grantee under the act, and having staked and laid out its road across the lands in question and having established and partly constructed a grade, a right of way has been secured under the Act, notwithstanding no profile of the road has been filed with or approved by the Secretary of the Interior. We cannot assent to this interpretation of the requirements of the statute, and we do not understand that the case of the Jamestown & Northern R. Co. v. Jones, 177 U. S. 125, sustains such an interpretation. In that case the railroad company had filed with the Secretary of the Interior its Articles of Incorporation and due proofs of its organization under the same on January 26, 1883, and had filed its profile map or map of definite location on March 13, 1883, and it had been approved by the Secretary of the Interior; but the road had been surveyed in 1881 and constructed upon this line of survey in 1882. The defendant in error who was a settler upon the land through which the railroad had been constructed, had filed a declaratory statement in the land office on June 5, 1883, alleging settlement of the land on March 3, 1883. The settlement of the defendant in error was ten days earlier than the filing of the profile map by the railroad company, but all the other acts required by the statute and performed by the railroad company were prior to such settlement and the railroad company had been engaged in operating its line of railroad on the right of way over the land for more than a year, and the question was whether, the railroad company having complied with the statute in all other respects prior to the settlement of the defendant in error upon the

land, the grant of the right of way took effect upon the construction of the road or upon the filing of the profile map. The Supreme Court held that the right of way was definitely located by the actual construction of the road and determined the rights of the parties upon that fact.

The subsequent case of Minneapolis, St. Paul Etc. Ry. Co. v. Doughty, 208 U. S. 251, 257, was also a controversy between the railroad company and a settler as to priority of right. The railroad company contended that when it had located its line of road and had commenced proceedings under the act to acquire the title to the right of way it was first in right to any unoccupied public land. This claim was denied and full effect given by the court to the requirement of section 4 of the act when it says, that "to secure a right of way three things are necessary: (1) location of the road; (2) filing a profile of it in the local land office; and, (3) the approval thereof by the Secretary of the Interior, to be noted upon the plats in the local office."

But there is no such question of priority between the railroad company and the settler in this case. The question is, what right has the railroad company acquired from the United States? The road has not been constructed and is not in operation over its projected right of way, and not having filed its profile map with the register of the land district and such map not having been approved by the Secretary of the Interior the railroad company has acquired no right of way under the Act of March 3, 1875. Red River & Lake of the Woods R. Co. v. Sture, 32 Minn. 95, 95 N. W. 229. Enock v. Spokane Falls, etc. Ry. Co., 6 Wash. 393, 397.

In the case of the Spokane Falls & N. Ry. Co. v. Ziegler, 61 Fed. 392, this court, referring to the act of March 3, 1875, said:

"The act therefore did not grant a right of way presently, but entitled any company to obtain the right of way upon performing certain conditions, and its right attached upon filing a profile map of its road, as provided in section 4. It will be observed that the provision of section 4 is that, after filing the profile of the road, all lands over which the right of way shall pass shall be disposed of subject to such right of way. Lands, therefore, which had been disposed of theretofore, were exempt."

This case was taken to the Supreme Court, and there affirmed. Spokane Falls & N. Ry. Co. v. Ziegler, 167 U. S. 65. The authority of these cases disposes of the construction sought to be placed upon the act by the appellees.

The requirement of the statute that the railroad company shall file with the register and receiver the profile of its road and this profile shall be approved by the Secretary of the Interior before any right attaches, is an important and far-reaching provision in view of the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands and particularly by section 441 of the Revised Statutes, wherein he is charged with the supervision of the public business relating to public lands. The requirement in the Sundry Civil Appropriation Act of August 30, 1890 (26 Stat. 391), "that all patents for lands hereafter taken

out under any of the laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States," and the provisions of the Reclamation Act wherein he is "authorized and directed, among other things, to make examinations and surveys for, and to locate and construct," as in the act provided, "irrigation works for the storage, diversion and development of waters" for the irrigation and reclamation of arid lands.

It is to be observed that the map required to be filed with the register of the land office and approved by the Secretary of the Interior by the Act of March 3, 1875, is a profile of the road. This is something more than an alignment map or a map of definite location. A "profile" is "the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows." (Standard Dictionary.) "A drawing exhibiting a vertical section of the ground along a surveyed line, or graded work, as of a railway, showing elevations, depressions, grades, etc." (Webster's In. Dictionary.) "A vertical section through a work or a section of country, to show the elevations or depressions." (Century Dictionary.)

With a map of this character before the Secretary of Interior showing the contour of the projected line of railroad through the public lands included in an irrigation and reclamation project, he can determine whether the construction of such a road would interfere with the project. He can determine also whether suitable provision has been made for the crossing of canals and other waterways, and, if not, what provision is required to preserve the work of the reclamation service from encroachment and impairment. All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road.

In this case the Circuit Court in its decree denied the prayer of the complaint for an injunction restraining the defendants from constructing its road across the lands of the reclamation project except as to the crossings over the several canals and laterals constructed by the United States. As to these crossings the court imposed certain conditions. The conditions appear to have had the approval of the Reclamation Service, but as it seems without the waiver of any right under the statute on the part of the United States; that is to say, the United States did not waive its contention that before the defendant railroad company could have a right of way through its public lands its profile map must have received the approval of the Secretary of the Interior, and have the consent or agreement of all the settlers, or the legal title acquired by condemnation or other proceedings to construct a road over their lands. In this view we concur. We think the approval of the conditions upon which the railroad company may have a right of way through the lands of an irrigation project is imposed by the statute on the Secretary of the Interior as a judicial act to be evidenced by his approval or disapproval of the profile map. We are of the opinion

also that the railroad company must have the consent or agreement of all the settlers or the legal title acquired by condemnation or other proceedings to entitle the railroad company to construct a road over their lands.

The decree of the Circuit Court is accordingly reversed, with instructions to grant the injunction prayed for in the complaint, to continue until such time as the court shall be advised that the railroad has the consent of both the United States and the settlers through whose lands the projected road will pass that the road may be constructed; the evidence that the United States consents to the construction of the road being the approval of a profile map of the road by the Secretary of the Interior, and the evidence that the settlers consent to the construction of the road being an agreement or conveyance of the right of way by the settlers. In the event that such agreement or conveyance cannot be had, then the title of the company to a right of way may be evidenced by a title secured according to law under condemnation or other proceedings.

(Endorsed:) Opinion, Filed Sept. 5, 1911, F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation) and The Utah Construction Company (a Corporation), Appellees.

Decree U. S. Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the District of Idaho, Central Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Idaho, Central Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, and that this cause be, and hereby is remanded to the said Circuit Court, with instructions to grant the injunction prayed for in the complaint, to continue until such time as the Court shall be advised that the railroad has the consent of both the United States and the settlers through whose lands the projected road will pass that the road may be constructed; the evidence that the United States consents to the construction of the road being the approval of a profile map of the road by the Secretary of the Interior, and the evidence that the settlers

consent to the construction of the road being an agreement or conveyance of the right of way by the settlers, and in the event that such agreement or conveyance cannot be had, then the title of the company to a right of way may be evidenced by a title secured according to law under condemnation or other proceedings.

(Endorsed:) Decree. Filed and Entered September 5, 1911, F. D. Monckton, Clerk.

At a Stated Term, To-wit, the October Term, A. D. 1911, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Court Room in the City and County of San Francisco, on Monday, the Sixth Day of November, in the Year of Our Lord One Thousand Nine Hundred and Eleven.

Present:

Honorable William B. Gilbert, Circuit Judge.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, a Corporation, et al., Appellees.

Order Denying Petition for a Rehearing.

It is ordered that the petition, filed October 3, 1911, for a rehearing of the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1930.

UNITED STATES OF AMERICA, Appellant,
vs.
MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY (a Corporation) et al., Appellees.

Order Staying Issuance of Mandate.

Upon motion of Mr. D. V. Cowden, attorney for appellees, and for good and sufficient cause shown, it is hereby ordered that the issuance of mandate in the above-mentioned cause be stayed for thirty days from this date.

San Francisco, November 10th, 1911.

(Signed) WM. B. GILBERT, *Judge.*

(Endorsed:) Order Staying Issuance of Mandate. Filed Nov. 10, 1911, F. D. Monckton, Clerk.

NOVEMBER 15, 1911.

Mr. F. D. Monckton, Clerk, U. S. Circuit Court of Appeals, San Francisco, Cal.

DEAR SIR: I have just received from the attorneys for the Minidoka & Southwestern Railroad Company information that they intend to appeal the case of the United States against that company to the Supreme Court, and that they wish to stay the mandate for a period of thirty days for that purpose. If Judge Morrow agrees to this, you will please hold the mandate for that period.

Yours sincerely,

(Signed) WM. B. GILBERT.

Let the Mandate be stayed to and including December 15, 1911.

(Signed) WM. W. MORROW,
United States Circuit Judge.

(Endorsed:) No. 1930. U. S. A. v. Minidoka & Southwestern Railroad Co., etc., et al. Order Staying Issuance of Mandate to and including Dec. 15, 1911. Filed Nov. 17, 1911. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation) and The Utah Construction Company (a Corporation), Appellees.

Petition for Appeal to Supreme Court U. S., and Order Allowing Same and Fixing Amount of Supersedeas Bond.

To the Honorable the Justices of the Said Circuit Court of Appeals:

The above named Appellees in the above-entitled cause respectfully represent that the said cause is now pending in the above-entitled Court, that a decree was therein rendered by the said Court on the 5th day of September, 1911, reversing the decree theretofore rendered in the United States Circuit Court for the District of Idaho. That the matter in controversy in said cause exceeds the sum of One Thousand ($1,000) Dollars, besides costs. That the said cause is one in which this Court has no final jurisdiction, and it is a proper cause to be reviewed by the Supreme Court of the United States on appeal. Wherefore, the said Appellees in the above entitled cause conceiving themselves aggrieved by the order and decree rendered and entered by the said Court in the said cause, on the

said 5th day of September, 1911, reversing the decree of the Circuit Court of the United States for the District of Idaho theretofore entered therein, do hereby appeal from said order and decree to the Supreme Court of the United States, and pray this Honorable Court that their appeal may be allowed;

That the amount of the supersedeas bond to be executed on behalf of said parties, pending said appeal, be fixed by the Court and that an order be made suspending the operation of this said decree, pending the said appeal, and until the final determination thereof;

That a transcript of the record proceedings and papers upon which said order and decree of said court is made, duly authenticated, may be sent to the Supreme Court of the United States, in accordance with the law and practice in such cases made and provided.

P. L. WILLIAMS,
D. WORTH CLARK,
Attorneys for the Said Minidoka & Southwestern Railroad Company and The Utah Construction Company.

Dated, San Francisco, California, Dec'r 9th, 1911.

Now, to-wit, on December eleventh, 1911, it is ordered that the appeal above prayed for be and the same is hereby allowed; That the said appellees be required to execute a bond to the United States in the sum of Ten Thousand ($10,000) Dollars, with good and sufficient surety, and that upon the approval and filing of said bond the same operate as a supersedeas, and that all proceedings under the order and decree of the said Circuit Court of Appeals be thereupon suspended until the final determination of said appeal.

WM. B. GILBERT,
Presiding Justice.

(Endorsed:) Petition for and Order Allowing Appeal, etc. Filed Dec. 13, 1911, F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation) and The Utah Construction Company (a Corporation), Appellees.

Assignment of Errors.

Come now the above named appellees and file the following assignment of errors upon which they and each of them will rely upon their appeal from the decree made by this Honorable Court on the 5th day of September, 1911, in the above-entitled cause.

I.

That said decree is erroneous wherein it reversed the decision of the Circuit Court of the United States for the District of Idaho, Central Division, and directed said Court "to grant the injunction prayed for in the complaint to continue until such time as the court shall be advised that the railroad has the consent of the United States that the road may be constructed," said decree in this respect being based upon the conclusion that the said lands over which said road was being constructed at the time of the commencement of this suit was and is public land of the United States subject to the provisions of the general right of way act of March 3, 1875. When in fact this court was in error in so deciding and such conclusion is not sustained or supported by the evidence in this case.

II.

That said decree is erroneous wherein it adjudges and directs the Circuit Court for the District of Idaho, "to grant the injunction prayed for in the complaint, until such time as the court shall be advised that the railroad has the consent of both the United States, and the settlers through whose lands the projected road will pass, that the road may be constructed." Said decree in this respect being based upon the conclusion that the United States has such an interest in lands filed upon and in the possession of homestead entrymen, pursuant to the homestead laws of the United States that its consent must be obtained before a railroad can be built thereover, this court being in error in holding such to be the law.

III.

That said decree is erroneous wherein it adjudges and directs the Circuit Court for the District of Idaho "to grant the injunction prayed for in the complaint to continue until such time as evidence shall be furnished to it, that the United States consents to the construction of the road over the land in question. The evidence of such consent to be the approval of the profile map of the road by the Secretary of the Interior," said decree in this respect being based upon the conclusion that no rights can be acquired to a right of way across the public lands by the actual construction of the road upon the ground, and that the actual construction of the road in advance of the filing of the map does not procure for a railroad company any rights under the Act of March 3, 1875. From the bill of complaint, the answer thereto, and the evidence in this case it appears without dispute that the railroad, the construction of which is, pursuant to said decree, to be enjoined, passes over lands which are all in the possession of homestead entrymen, who are holding the same in all respects in due compliance with the homestead laws of the United States. That the defendant railroad company had prior to the commencement of this suit purchased or obtained from these homestead entrymen, a right of way upon which to construct the railroad in question, and had prior to the commencement of this

suit actually constructed the same to the extent of building the grade upon which to lay the ties and track, and, therefore, the court erred in directing the Circuit Court for the District of Idaho to grant the injunction prayed for.

IV.

That the decree is erroneous wherein it adjudges and directs the Circuit Court for the District of Idaho to grant the injunction prayed for in the complaint, there being no evidence adduced that the complainant has or will suffer any damage or injury by reason of the construction of the road in question.

V.

That the decree is erroneous wherein it grants to the complainant the adjudged relief for the reason that the United States has no interest in the matters involved in this suit.

VI.

The Circuit Court of Appeals erred in directing that an injunction be granted as prayed for in the complaint "to continue until such time as the court should be advised that the railroad has the consent of both the United States and the settlers through whose land the projected road will pass that the road may be constructed, the evidence that the United States consents to the construction of the road being the approval of the profile map of the road by the Secretary of the Interior," the evidence in this case disclosing that the land over which said railroad was being constructed was and is in the possession of homestead entrymen and that the same is not public land of the United States subject to the provisions of the right of way act of March 3, 1875.

VII.

The court erred in holding that the law requires a profile map to be filed in order to secure a right of way under the Act of March 3, 1875.

VIII.

That said decree is erroneous in adjudging and directing the Circuit Court for the District of Idaho to grant the injunction prayed for in the complaint, the evidence and record in this case clearly showing that the plaintiff is not entitled to the relief prayed for or any relief.

IX.

The said court erred in reversing the decree rendered and entered herein by the Circuit Court of the United States for the District of Idaho.

Wherefore the said appellees pray that this assignment of error

be made of record in said cause and that the decree made and entered herein of the said Circuit Court of Appeals be reversed.

P. L. WILLIAMS,
D. WORTH CLARK,
Solicitors for Appellees.

Residence and Post Office Addresses of:
P. L. Williams, Salt Lake City, Utah.
D. Worth Clark, Pocatello, Idaho.

(Endorsed:) Assignment of Errors. Filed Dec. 13, 1911, F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation) and The Utah Construction Company (a Corporation), Appellees.

Bond on Appeal to Supreme Court U. S.

Know all men by these presents that we, the Minidoka & Southwestern Railroad Company and Utah Construction Company, Corporations of the State of Utah, the above named appellees as principals and National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound to the United States of America, the above named appellant, in the sum of Ten Thousand ($10,000) Dollars, to be paid to the said United States for the payment of which well and truly to be made we bind ourselves, and each of us, our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 9th day of December, in the year of our Lord 1911.

Whereas, the above named appellees have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by said Circuit Court of Appeals,

Now therefore the condition of this obligation is such that if the above named appellees shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

MINIDOKA & SOUTHWESTERN
RAILROAD COMPANY,
UTAH CONSTRUCTION COMPANY,
By P. L. WILLIAMS AND
D. WORTH CLARK,
Their Attorneys.
NATIONAL SURETY COMPANY OF
NEW YORK,
By FRANK L. GILBERT,
Resident Vice-President.
[SEAL.] J. F. SEGRUE,
Resident Ass't Secretary.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 9th day of December, 1911, personally appeared Frank L. Gilbert, known to me to be the person who executed the foregoing bond on behalf of the National Surety Company, *on* being by me duly sworn on oath states that he is the Resident Vice-President of the National Surety Company of New York; that he knows the corporate seal of said company and that the same is affixed hereto. He further states that he is the duly authorized agent of the Board of Directors of the said National Surety Company, of New York, and is duly authorized by them to execute the said Bond and that the same is executed for and on behalf of the said National Surety Company as surety for the uses and purposes set forth in the said bond.

——— ———.

Subscribed and sworn to before me on the day and year above set forth.

[SEAL.] M. V. COLLINS,
Notary Public.

My commission will expire April 14, 1913.

The foregoing bond is approved this Dec. 11, 1911.

WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Bond on Appeal to Supreme Court U. S. Filed Dec. 13, 1911, F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1930.

THE UNITED STATES OF AMERICA, Appellant,
vs.
THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY (a Corporation) and The Utah Construction Company (a Corporation), Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-six (36) pages, numbered from and including one (1) to and including thirty-six (36), to be a true copy of the Assignment of Errors and of all proceedings had in the above-entitled case in the said United States Circuit Court of Appeals for the Ninth Circuit including the Opinion filed therein, as the same remain on file and of record in my office, and that the same in connection with the

preceding Certified Copy of the Printed Transcript of Record, constitute a true copy of the complete record in the above-entitled case and the transcript of Record upon the appeal taken therein from the said Circuit Court of Appeals to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of December, A. D. 1911.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The United States of America, and to C. H. Lingenfelter, United States Attorney for the District of Idaho, and B. E. Stoutemyer, Attorneys for the said United States, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court to be holden at the City of Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein the Minidoka & Southwestern Railroad Company, a Corporation, and the Utah Construction Company, a corporation, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William B. Gilbert, Presiding Justice of said Circuit Court of Appeals, this eleventh day of December, A. D. 1911.

WM. B. GILBERT,
Presiding Justice, United States Circuit Court of Appeals, Ninth Circuit.

I hereby certify that I received the within citation at Boise, Idaho, on December 16th, 1911, and that I served the same upon C. H. Lingenfelter, United States Attorney for the District of Idaho, by handing to and leaving with the said C. H. Lingenfelter, personally, a copy of the within citation at Boise, Ada County, Idaho, on December 16th, 1911.

S. L. HODGIN,
U. S. Marshal,
By H. G. DIETRICH,
Deputy.

I hereby certify that I served the within citation upon B. E. Stoutemyer by handing to and leaving with the said B. E. Stoute-

myer, personally, a copy of the within citation at Boise, Ada County, Idaho, on December 18th, 1911.

S. L. HODGIN,
U. S. Marshal,
By E. W. BEEMER, *Deputy.*

Boise, Idaho, Dec. 18th, 1911.

Service of the within Citation and receipt of a copy thereof admitted this — day of December, 1911.

——— ———,
——— ———,
Solicitors for Complainant and Appellee.

[Endorsed:] Citation. Docketed. No. 1930. United States Circuit Court of Appeals for the Ninth Circuit. Citation on appeal to Supreme Court U. S. Filed Dec. 23, 1911. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. H 417 Civ. 12/16, '11.

Endorsed on cover: File No. 23,026. U. S. Circuit Court Appeals, 9th Circuit. Term No. 950. Minidoka & Southwestern Railroad Company and Utah Construction Company, appellants, vs. The United States. Filed January 24th, 1912. File No. 23,026.

2

Office Supreme Court, U. S.
FILED
SEP 30 1914
JAMES D. MAHER
CLERK

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1914.

No. 19.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA.

APPELLANTS' BRIEF.

HENRY W. CLARK,
P. L. WILLIAMS,
A. A. HOEHLING, JR.,
Of Counsel.

C. G. BUNCOMBE, 72 to 78 Spring Street, New York.

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OCTOBER TERM, 1914.

No. 19.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY and UTAH CONSTRUCTION COMPANY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANTS.

Statement.

The United States of America (hereinafter called "Complainant") filed its bill of complaint (Record, pp. 1–10) in the Circuit Court of the United States in and for the Central Division of the District of Idaho praying a perpetual injunction restraining the appellants from the construction of a railroad upon certain lands described in the bill, being lands within the limits of the so-called Minidoka Reclamation Project in the southern part of the State of Idaho. The appellant, Minidoka and Southwestern Railroad Company (hereinafter called the "Railroad Company") ad-

mitted that it was engaged in the construction of a railroad over lands within the boundaries of the irrigation project but alleged the acquisition of right of way therefor from private owners and homestead settlers of the land (answer, pp. 35–49). The answer of appellant, Utah Construction Company (pp. 50, 51) is unimportant, that Company being merely the contractor employed by the Railroad Company for the construction work. On application for temporary injunction it was held that the Complainant was entitled to no relief except the protection of the irrigation ditches (Opinion by District Judge DIETRICH, pp. 60–77 ; 176 Fed., 762). After a final hearing, on facts chiefly stipulated, decree was entered July 15, 1910 (decree, pp. 79–84 ; opinion, p. 122), denying the Complainant's prayer for injunction except as to crossings of the railroad over specified irrigation canals and laterals, and perpetually enjoining the construction of the railroad across the said canals and laterals unless such crossings were constructed in a manner, prescribed in detail in the decree, designed to insure against any interference with the free flow of water through the ditches. Complainant appealed to the Circuit Court of Appeals for the Ninth Circuit from the part of the decree denying the prayer for injunction except as to the crossings over the canals and laterals (pp. 129–132). The Circuit Court of Appeals, GILBERT, MORROW and WOLVERTON, JJ., reversed the decree below and directed that the injunction prayed for by Complainant be granted, to continue until such time as the Court should be advised that the Railroad Company had the consent of both the Complainant and the settlers to the construction of the road, such consent on the part of the Com-

plainant to be evidenced by the approval by the Secretary of the Interior of a profile map of the road and, on the part of the settlers, by their right of way conveyances (opinion, pp. 203–211 ; 190 Fed., 491 ; decree, p. 211). Petition for rehearing was made and denied (p. 212). Thereupon appellants appealed to this Court.

The substantial facts upon which the final decree of the Circuit Court was made are as follows : Complainant had undertaken an irrigation project in Lincoln and Cassia Counties, Idaho, under the Reclamation Act (Act of June 17, 1902 ; 32 Stats., 388 ; Appendix, p. VI.), consisting of a diversion dam across the Snake River, a reservoir and numerous canals, laterals, irrigation ditches and drainage ditches, with an electrical power plant and transmission line for pumping purposes. The section of the project involved in this case, known as the South Side Minidoka Project, embraced about 130,000 acres of irrigable land, and was, at the time of the hearing (June 18, 1910), under construction and partly in operation (pp. 86, 87, 89). On November 17, 1902, the Secretary of the Interior under the authority of the Reclamation Act withdrew from entry, *except under the homestead law*, certain public lands believed to be susceptible of irrigation (p. 90 ; withdrawal order, p. 58). In 1909 the Railroad Company surveyed and began the construction of a railroad line between the towns of Burley and Oakley, crossing this reclamation project (pp. 92, 93). The lands within the boundaries of the reclamation project which are crossed by the railroad line are in sections 19 and 30 of township 10 south, range 23 east of the Boise Meridian ; sections 25 and 36 of township 10 south, range 22 ; and sections 1, 12, 11 and 14 of township 11 south, range 22 (Defend-

ant's Exh. 2, p. 201). Not all of these sections, however, were public lands affected by the withdrawal order. Section 36 was a school land section previously granted by the United States to the State of Idaho and all portions of that section crossed by the railroad had been sold by the State to private parties (p. 91). Some of the land in section 19 crossed by the railroad was already patented (p. 91). The only lands as to which the Complainant claims any control or makes any contention in this suit are the subdivisions crossed by the railroad in the sections above enumerated, other than section 36 and the patented portion of section 19 (stipulation, pp. 90, 117). All of said subdivisions crossed by the railroad had been unentered, unoccupied public lands at the time of the withdrawal order of June 17, 1902, but were thereafter and before the construction of the railroad duly entered by various persons under the homestead laws (pp. 90, 91). All said entries were made by the persons and at the times shown on the map, defendant's Exhibit 2 (p. 201) and were still intact at the time of final hearing and the lands in possession of the entrymen, except such possession as Complainant had of canals and laterals crossing said lands (p. 115). All of said entrymen had conveyed to the Railroad Company by good and sufficient deeds such right as they were able to convey for a right of way over said land, such right of way being the right of way on which the railroad was constructed (pp. 115, 116), except that in the case of the south half of section 14 the Railroad Company had constructed across the land upon the oral consent or license of the entryman, but had not at the time of hearing procured a deed (pp. 120–122).

Construction of the railroad was commenced shortly

after November 1, 1909, and at the time of hearing the grading was completed (pp. 111, 113).

The railroad crosses three main canals and nine laterals constructed in 1908 and 1909 prior to the railroad survey (pp. 87, 88, 95, 96). It was stipulated in behalf of Complainant, without waiving its claim that the Railroad Company had no right to cross the irrigation canals, that crossings constructed according to plans marked "Plaintiff's Exhibits A and B" (pp. 141–153) would not interfere with the flow of water or endanger the safety of the canals (pp. 98–100), and it was on these plans that the provisions of the final decree as to methods of constructing crossings were based. These plans and the provisions of the decree show that the construction of the necessary crossings was simple, the inside dimensions of the waterway required for the laterals being in no case larger than 5 feet wide and $3\frac{1}{2}$ feet deep, and in several cases only $2\frac{1}{2}$ feet wide and $2\frac{1}{2}$ feet deep, and the main canals requiring only two-span pile trestles about 25 feet in extreme length to accommodate a waterway about 5 feet deep with embankments sloping to a bottom width of 4 feet. Some testimony was offered by Complainant intended to show that the railroad would interfere with the irrigation of a large additional acreage, or at least make more expensive the construction of an additional canal for this purpose, but it appeared that to reach most of this additional acreage the canal would not cross the railroad and that no such additional work had been authorized (pp. 101–108).

None of the lands involved in this suit were withdrawn from entry under the first form of reservation authorized in Section 3 of the Reclamation Act,

namely, an absolute withdrawal of lands required for the irrigation works themselves; the withdrawal aforesaid being only in the second form authorized by said section, namely, a withdrawal from entry, except under the homestead laws, of the lands to be irrigated (pp. 90, 109, 115). It is not claimed by Complainant that even the rights of way for the canals were reserved by a withdrawal under the first form of withdrawal (pp. 63, 88). The Railroad Company is a railroad corporation organized under the laws of Idaho, owning a railroad from Minidoka, through Burley, to Buhl, all in the State of Idaho, and with charter power to construct a line from Burley to Oakley, and had complied with all the laws of the State of Idaho relating to the organization of railroad corporations and their right and authority to acquire and hold rights of way for the construction and operation of railroads (answer, pp. 43-45; stipulated, p. 108). Defendant's Exhibit 1 (pp. 154-200) consists of papers filed with the United States Land Office, showing the due organization of the Railroad Company, including an amendment of its articles covering the line in question (pp. 191-200). This amendment was transmitted to the Secretary of the Interior May 8, 1910, by the Assistant Commissioner of the General Land Office, with his approval, and was on May 18, 1910, approved by the First Assistant Secretary of the Interior (p. 190). The original articles of incorporation and other proofs of due organization had been previously filed and were approved by the Secretary of the Interior, as conforming to the regulations for filing under the Act of March 3, 1875 (p. 156).

Assignment of Errors.

The Court below erred in the following respects:

1. In holding that the land in controversy was public land of the United States subject to the provisions of the general right of way act of March 3, 1875.

2. In holding that the United States had such an interest in lands filed upon and in the possession of homestead entrymen, pursuant to the homestead laws of the United States, that its consent must be obtained before a railroad could be built thereover.

3. In holding that the map of definite location under the Act of March 3, 1875, must be a profile.

ARGUMENT

POINT I.

The authority to convey a right of way for railroad purposes expressly given to homestead settlers by Section 2288 R. S. is not impaired by the provisions of the Reclamation Act.

Section 2288 of the Revised Statutes as amended by Act approved March 3, 1905, Chapter 1424, 33 Statutes 991, provides as follows :

> " Any *bona fide* settler under the pre-emption, homestead or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it ; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim."

It is stipulated that, with the exception of some patented tracts and the former school land tracts in Section 36 as to which complainant makes no claim in this suit, all the lands within the reclamation project crossed by the railroad line had been entered as homesteads and that the homestead settlers had conveyed to the Railroad Company, to the extent of their power to convey, a right of way for railroad purposes, saving one parcel over which the railroad had been constructed with the consent of the homestead settler but in advance of final settlement with him. Both the

Circuit Court of Appeals and the Circuit Court agreed that the homestead settlers were authorized by the statute above quoted to make such a conveyance. Judge DIETRICH, rendering the opinion of the Circuit Court on motion for temporary injunction, considered at some length the provision of Section 2288 of the Revised Statutes as amended, and said in substance that in his view no substantial reason had been offered or could be offered for refusing to the homestead settler, notwithstanding the modification of the settler's rights effected by the Reclamation Act, the benefit of the power conferred by Section 2288, R. S., to make conveyances for the public purposes enumerated therein, and that such a conveyance by the homestead settler either operates under the statute as a grant of the Government's whole interest or at least authorizes occupancy and use for the purposes specified in the conveyance during the life of the homestead entry and that for the purpose of this suit under either view the Railroad Company's present occupancy and use were fully authorized by law (Record, pages 67–73). The Circuit Court of Appeals considered the claims of the homestead settlers as nothing more than possessory claims but deemed that the settlers as such possessory claimants had the right to make conveyances under Section 2288 R. S., as amended, although the Court held that a complete right of way could not be secured by the Railroad Company without the consent also of the Government (Record, pages 206, 207).

In thus confirming the power of homestead settlers to make conveyances for public purposes notwithstanding the provisions of the Reclamation Act, the conclusion of the Courts below is obviously sound.

There is nothing in the express terms or necessary effect of the Reclamation Act which impairs the right conferred by Section 2288, R. S. The Reclamation Act, enacted June 17, 1902 (Appendix, page VI.), set aside and reserved certain revenue as a reclamation fund to be used for the construction of irrigation works for the reclamation of arid and semi-arid lands, and authorized the Secretary of the Interior to withdraw from public entry the lands required for any irrigation works, that is, required for actual occupation by the Government, and to withdraw from entry *except under the homestead laws* any public lands believed to be susceptible of irrigation from said works. While expressly reserving the operation of the homestead law and the right to make entries thereunder within lands withdrawn as irrigable, the Act provided that all homestead entries within such area should be subject to all the provisions, limitations, charges, terms and conditions of the Act. The only provisions of the Act having any application to the right of the entryman and effecting any modification of the homestead law are the following: That the land should be subject to homestead entry in tracts of not less than 40 or more than 160 acres, as the Secretary of the Interior shall prescribe. That the commutation provisions of the homestead laws shall not apply to such entries. That the entryman shall pay such a charge per acre for the cost of construction of the irrigation project, and in such number of annual instalments not exceeding ten, as the Secretary shall prescribe. That the entryman shall reclaim at least one-half of the total irrigable area of his entry for agricultural purposes. That patent shall not be issued until the settler has paid to the Govern-

ment the charges apportioned against his tract That a failure to make any two payments of such charges shall render the entry subject to cancellation. The only effect of these limitations is to impose upon the settler as a condition of earning his patent some burdens of money payments and tillage additional to any conditions imposed by the general homestead laws. No attempt is made by the Reclamation Act to alter the legal quantity or quality of the title or interest acquired by the homestead settler. The settler within a reclamation area, upon duly initiating his entry, acquires an inchoate title in all respects equivalent to the inchoate title acquired by the homestead settler upon public land not within a reclamation area. A right of exclusive possession is an incident of this title. In either case the entry is subject to cancellation for failure to comply with the conditions of the law subject to which the entry was made, and the only practical difference between the two cases is that the entryman within a reclamation area is subject to a larger number of conditions the breach of which may result in forfeiture of his rights. But this practical difference does not amount to an increase in legal effect of the Government's estate and interest.

The purposes of Section 2288 R. S. are obvious. Judge DIETRICH in his opinion in this case discusses these purposes most clearly and refers to the sad plight in which homestead settlers would be placed if they were powerless to transfer any part of their claims for such essentially public purposes as churches, cemeteries, schools and railroad right of way. The same necessity for the exercise of this power exists in the case of homestead settlements within

a reclamation area as exists outside of such areas, and there is no vestige of a warrant in the terms of the Reclamation Act for the assertion that the power to make such conveyances within the reclamation area is in any respect different from the power to convey possessed by homestead settlers outside of reclamation areas.

If further consideration is needed to justify the conclusion that the Reclamation Act effects no change in the power of homestead settlers to make conveyances for public purposes, it may, we submit, be found in the enactment in 1905 of the amendment to Section 2288, R. S., extending the power of settlers in this respect, all without reference to the Reclamation Act then recently enacted. In its original form, Section 2288 extended only to settlers under the pre-emption or homestead laws and authorized conveyances only for church, cemetery, school or railroad right of way purposes. The Section was amended by Act of March 3, 1891, Chapter 561, Section 3, 26 Statutes 1097, to extend the right to all *bona fide* settlers under any settlement law and to add to the purpose for which such conveyances were authorized rights of way for canals, reservoirs, or irrigation or drainage ditches. The amendment of 1905, 33 Statutes 991, added rights of way for telegraph and telephone lines.

It should be noted that power conferred by Section 2288 may be exercised by any *bona-fide* settler under any settlement law. Whether or not the Circuit Court of Appeals in this case was correct in characterizing the interest of the homestead settlers as mere possessory claims, these settlers are certainly claiming under a settlement law, and are therefore within the express benefit of this statute.

Several supposed reasons were advanced in behalf of Complainant in the lower courts for denying to homestead entrymen within a reclamation area the right to grant a railroad right of way. These reasons amounted to arguments of convenience and are unimportant in view of the fact that Congress has not seen fit to curtail the power of the entrymen in this respect, but they may deserve brief comment. It was suggested that such grants might impair the ability of the Government to secure reimbursement of the cost of the irrigation project. It is not apparent how this could be a result, for the authority of the Secretary to apportion the construction cost upon an acreage basis will not be limited by any such grants which the entrymen may have made. There will remain the same number of acres as a basis of the apportionment. The estimated share of the project charge apportionable to the area included in the right of way granted will probably be an incident of the bargain between the entryman and the railroad or other grantee, or, if an increased burden falls upon the homesteader in proportion to the irrigable acreage retained by him because of his omission of the foresight to secure this portion of the assessment from the railroad, he will nevertheless be compensated by the enhanced value of this land for profitable use or for ultimate sale which will be caused by the railroad construction. It was suggested also, and is alleged in the bill, that the construction of a railroad grade *pro tanto* destroys the land for cultivation. But we find no requirement in the Act that every foot of land within the reclamation area shall be reduced to and maintained in a state of cultivation;

on the contrary, Congress, as evidenced by the express terms of the Act, deemed it sufficient that each homesteader should reclaim one-half of the *irrigable* area of his claim. It was further complained that a future enlargement of the irrigation system may require canals or ditches in addition to those now constructed, some of which may necessarily cross the railroad right of way, and that these lands, being west of the 100th meridian, are subject to a reservation in the Act of August 30, 1890 (Appendix, p. IV.), of a right of way for ditches and canals constructed by authority of the United States. This proposition was fully answered by Judge DIETRICH in his opinion herein. He said, concerning this proposition, that the rights of the United States by virtue of the reservation in the Act of 1890 are no greater before than after patent, and that it might well be doubted whether the contention would be made that a railroad company holding a deed from the patentee for the right of way across land, the patent to which contains such a reservation, should, at the instance of the Government, and solely because of such reserved easement, be enjoined from using its right of way; and that it does not follow that because of the reservation in favor of the Government the patentee and his grantee must refrain from occupying or using the land pending the selection and location by the Government of needful rights of way. Judge DIETRICH concluded that the purposes of the reservation require only that the absolute possession and dominion of the owner yield to the needs of the Government when, and to the extent that, they actually arise (pages 73, 74).

No reasons have been advanced, and we know of none which could be advanced, tending to the con-

clusion that any limitation upon the rights of homestead settlers within a reclamation area to make conveyances for public purposes must be implied from the Reclamation Act to insure all necessary and reasonable protection of the rights of the Government. The contentions in behalf of the Complainant in this suit amount to a claim of absolute control over the purposes to which any homestead lands may be devoted, a claim unwarranted by the statutes and unnecessary in fact.

POINT II.

The lands in question were not public lands and there was no authority under the general right of way Act of 1875 for the filing or approval of a map of definite location affecting them.

The Circuit Court of Appeals in this case characterized the interest of the homestead settlers within the reclamation area as mere possessory claims and concluded that, in view of the reversionary interest of the Government therein, the lands were still public lands, and therefore decreed an injunction against the railroad construction unless the railroad company supplemented the grants of the homestead settlers by securing the approval of a map of definite location under the general right of way Act of 1875.

As we have already argued, under Point I, the nature of the legal interest and estate of the homestead settler is the same whether the settlement be

upon lands within the reclamation area or outside of such area. The only theory upon which the lands in question were held by the Circuit Court of Appeals to be public lands was that many conditions remained to be performed by the entryman before he could obtain complete title from the Government. But, as we have already shown, the only difference between these homestead settlers and homestead settlers outside a reclamation area consists of the number of conditions with which each must comply. The reversionary or contingent estate of the Government is no greater in one case than in the other, although the possibility of forfeiture may be greater in the case of the settler within the reclamation project in view of the additional burdens imposed upon him.

The general right of way Act grants a right of way "through the public lands of the United States" and provides that such a right of way shall be obtained by filing a map of definite location of the proposed railroad and securing its approval by the Secretary of the Interior. But the Act applies only to the *public lands*, and no power or authority for the filing or approval of a right of way map can be derived from this statute in respect of lands which are not public lands.

We believe that it is no longer open to question that lands which have been entered by homestead or other settlers under the public land laws are not public lands within the meaning of the general right of way Act. In *Bardon vs. Northern Pacific Railroad Company, 145 U. S., 535, 538*, this Court said: "The grant "is of alternate sections of public land, and by public "land, as it has been long settled, is meant such "land as is open to sale or other disposition under "general laws. All land, to which any claims or

" rights of others have attached, does not fall within " the designation of public land." See also *Barker vs. Harvey, 181 U. S., 481, 490; Northern Lumber Co. vs. O'Brien, 204 U. S., 190, 196; United States vs. Buchanan, 232 U. S., 72.* In *Union Pacific Railroad Co. vs. Harris, 215 U. S., 386,* the Union Pacific Railroad Company claimed a right of way through a quarter section which had been entered for homestead at the time the railroad's map of definite location was filed. The claim was based on the special grant of a right of way to that company by Act of July 1, 1862, 12 Statutes 489. The grant by that Act was of a " right of way through the public lands " and the grant was therefore exactly the equivalent of that made by the general right of way Act. It was urged in behalf of the railroad that the decisions under grants of land in aid of construction of railroads were distinguishable; that the mere preliminary steps to acquire land under the homestead or preemption laws do not take such land out of the category of public lands or disable the Government from disposing thereof, and that the right of way grant through all public lands should be construed as intended to extend to homestead lands. Practically the only question argued in that case was whether the land there in controversy, in view of the homestead settlement existing at the time the railroad map was filed, was or was not public land within the meaning of the Union Pacific right of way grant. This Court squarely held that the homestead land was not public land within the meaning of the right of way grant. The *Harris* case controls the present case as to the point now under consideration. The scope of the Union Pacific right of way grant and of the grant

in the general right of way Act are identical. If lands entered for homestead were not public lands subject to the Union Pacific right of way grant, they are not public lands within the meaning of the general right of way Act.

The above conclusion is in accord with the views entertained by the Department of the Interior prior to the birth of a desire to exercise an absolute dominion over all lands and things comprised within the boundaries of reclamation projects. Theretofore the Department refused to approve maps of definite location over lands covered by outstanding entries under various land laws, on the ground that such lands were not public lands within the application of the general right of way Act. In the case of *Montana Central Railroad Company, 25 Land Decisions, 250*, the railroad company had sought approval of a station plat under the Act of March 3, 1875, covering land embraced within a previous mineral entry. It appeared that the railroad had condemned a right of way across the mineral claimant's land under the local laws but sought for its full protection the approval of a map of definite location, in the event that the mineral applicant should abandon his claim, evidently sharing the view of the Circuit Court of Appeals as expressed in this case that it needed to acquire by condemnation or by voluntary grant a right of way as against the settler and also by proceedings under the right of way Act a right as against the Government's reversionary interest. The Secretary of the Interior said: "The right of way granted by the Act "of 1875, *supra*, is limited to public lands; and where "there are no public lands embraced within the "application for right of way it has been uniformly

"held by this Department that approval will not be "granted. * * * Upon the facts disclosed by the "record, I can find no error in the holding of your office, "that the tract covered by the company's plat sub- "mitted for approval is not public land within the "meaning of the Act of March 3, 1875, and the plat is "therefore not subject to approval under said Act." See also *Santa Fe, Prescott & Phoenix R. R. Co., 22 Land Decisions 685; Kern Valley Water Co., 15 Land Decisions, 577.*

All the lands crossed by the railroad line of the Railroad Company within the Minidoka Reclamation Project except those already patented and those held under grants from the State of Idaho were covered by valid subsisting homestead entries. These entries were not made under the Reclamation Act, but under the general law. The Reclamation Act does not create the right of entry, but permits the Secretary of the Interior to withdraw lands within a reclamation project from settlement except under the homestead laws, thus leaving the general homestead law to operate within the reclamation area as if there had been no withdrawal of the land for any purpose.

The homesteads involved in this case were not therefore public lands to which the general right of way Act was applicable. No right could have been obtained over these lands by filing a map under the right of way statute and the decree of the Circuit Court of Appeals requiring such filing is contrary to the statute.

It was not contended in behalf of the Complainant in the court below that these homesteads constituted public lands; it was asserted on the contrary by the

Government that the Act of 1875 did not apply. In other words, Complainant contended that the Railroad Company could acquire a right of way neither under the Act of 1875 nor by conveyances from the settlers under Section 2288. If this view were sound, it would necessarily follow that there is no power in any Government department or officer to grant or consent to any right of way for railroad purposes through land within a reclamation project. The accomplishment of this result, with its detrimental effect upon the development of the territories reclaimed by the Government under the Reclamation Act, is not the object of the Government. Its object is to deny to railroads the acquisition of any right of way through reclamation projects as a matter of right, in the belief that such right of way can then be granted by the Department as a matter of favor unrestrained by any statutory limitations and subject to such arbitrary conditions as the Department may see fit to impose. There is no warrant in the Reclamation Act or in any other statute for the exercise of the power which the Department desires to exercise and there is no escape from the conclusion that a railroad right of way over homestead land within a reclamation area must be obtained by voluntary conveyance from the homestead settlers or not at all.

POINT III.

The right of way granted by homestead settlers under the authority of Section 2288 R. S. is complete and perfect. The statute itself operates as the consent of the government to subject its interest in the land to the right of way.

There are two aspects of this proposition, namely, (*first*) whether the settler alone can grant a right of way effective during the life of his entry, (*second*) whether the right of way derived by grant of the settler alone can remain effective after the forfeiture of the settler's entry. The second branch of inquiry is not necessary to the present case. The object of this suit being to enjoin the construction of the railroad, it is sufficient to establish that the settlers have power to convey a right of way good during the life of their entries, leaving for the future the determination of the Railroad Company's predicament in case any of the entries fail to ripen into patent. We wish, however, by separate presentation to emphasize these two different aspects of the proposition, because it seems apparent from the decision of the Circuit Court of Appeals that difficulties foreseen as to the relative rights of the Railroad Company and the Complainant in the event of the forfeiture of the settler's entry have confused and complicated the question, clear by itself, as to the effect of the settler's conveyance during the life of his entry.

The inquiry on this subject relates equally to the effect of a conveyance by a settler outside a reclamation area and a conveyance by a settler within a recla-

mation area. There is no basis for a contention that a settler's conveyance for public purposes within a reclamation area has a more limited scope and effect than a similar conveyance outside such area.

1.

During the Life of the Homestead Entry.

The statutory grant to settlers of power to make such conveyances is an extension of the use and occupation to which the land entered may be subjected, and this statutory permission in itself and by its very nature legalizes such use and occupation, upon the settler's grant of authority therefor, at least during the continuance of the settler's estate.

Section 2288, R. S., contains no express provision that the Government's consent shall be obtained to supplement the grant of the settler. The provision is that any *bona fide* settler under any settlement law shall have the right to transfer. The transfer is not made conditional upon the consent and concurrence of the Secretary of the Interior or any other public official.

There is no reason for implication that the consent of the government is necessary. The object of all the settlement laws was to permit and encourage the settlement and development of lands within the public domain. The statute was passed in recognition of the absolute necessity that settlers should have the power to make conveyances for schools, cemeteries, railroads and similar public purposes, essential to the full enjoyment of the land and the development of a civilized and prosperous com-

munity. If the right of conveyance so enacted were construed as requiring for its completion and effectiveness some new act to evidence the consent of the government, the authority of the statute would amount merely to authority to execute a worthless instrument. The settler could convey a site for a school house, but actual use of such site for school purposes would constitute a trespass against the United States. There was no machinery provided under any statute by which the grantee of the settler could obtain the consent of the government. The Circuit Court of Appeals concluded that the machinery for obtaining such consent was provided by the general right of way statute, enacted two years later, which freely granted railroad rights of way over the public lands and provided for condemnation therefor against private owners and settlers. But the general right of way statute provides, as we have shown under Point II, for filing a right of way map only as to land *exclusively* public, not as to land withdrawn from the public domain by entries under the land laws. This view is emphasized by the consideration that the right of way Act deals only with railroad rights of way, while Section 2288 permitted conveyances also for churches, schools, cemeteries, etc. If the conveyance by the settler under Section 2288 were incomplete and ineffective as to railroads until supplemented by a proceeding under the general right of way Act, a grant by settlers for schools, churches and cemeteries could never be made complete and effective. The only reasonable conclusion is that Congress intended that the power exercised by the settler under Section 2288 should be complete and effective, not only as to the settler's interest, but also as to the Government's interest in the land,

in other words, that the statute itself should evidence or constitute the Government's consent to subject its contingent interest to the use of the land for public purposes designated. It was upon substantially the foregoing considerations that Judge DIETRICH in the Circuit Court in this case said (p. 72): "The con- "clusion is unavoidable that, subject to the entry- "man's conveyance, the Act of 1873, if it does not "operate as a grant of the Government's interest, at "least authorizes occupancy and use for the purposes "specified in the conveyance during the life of the "entry."

The Circuit Court of Appeals placed some emphasis upon the provision that the transfer by the settler may be "by warranty against his own acts" and indicated a view that this clause of Section 2288 limits the extent and scope of the conveyance permitted. The provision as originally enacted in 1873 (17 Stats., 602) was "That any person who has already settled or "hereafter may settle on the public lands of the "United States, either by preemption, or by virtue of "the homestead law or any amendments thereto, shall "have the right to transfer by warranty, against his "or her own acts, any portion of his or her said pre- "emption or homestead for church, cemetery, or "school purposes, or for the right of way of railroads "across such preemption or homestead, and the trans- "fer for such public purposes shall in no way vitiate "the right to complete and perfect the title to their "preemptions or homesteads."

It is impossible to demonstrate the purpose and intention of the use of the phrase "by warranty against his or her own acts." It may have been intended as a clause of limitation, in the sense that the legislators

desired that conveyances for the public purposes specified should be by warranty deeds as evidencing the fullest and best title which the grantor could convey rather than by a conveyance of an inferior character. On the other hand it may have been intended as an enlargement, rather than a limitation, of the settler's power, as negativing any possible inference that the settler by reason of the conditional nature of his estate could convey only by quitclaim. In whichever sense the clause was used no importance attaches to the provision that the warranty should be "against his or her own acts." A conveyance by *general* warranty of title would be entirely inappropriate for the use of a preemption or homestead settler, would be ventured by only the most reckless of individuals in such a situation, since it would be an undertaking on the part of the grantor to defend and protect the grantee against the rightful claims of all persons to the title. Recognizing the inappropriateness of a general warranty in such cases, a special warranty against acts done or suffered by the grantor was referred to instead, a covenant answering the fullest possible purpose of the grantee in case the land had really been public land open to entry and settlement at the time the homestead or preemption of the grantor had been initiated.

It seems to us that the original language of this section as above quoted renders its purpose and intention somewhat clearer than the language resulting from the various amendments. It will be noticed that the section was originally limited to settlers under the preemption and homestead laws. They were empowered to transfer "*any portion* of his or her *said* "*preemption or homestead* for church, cemetery, or "school purposes, or for the right of way of railroads

"*across such preemption or homestead.*" And such transfer was in no way to vitiate the right to perfect "*the title to their preemptions or homesteads.*" Obviously, in this form the terms "preemption" and "homestead" were used as meaning the *land* subject to the preemption or homestead entry and not merely the qualified estate of the settler in the land. In the amendment of 1891, the scope of the section was broadened to include any *bona fide* settler under any settlement law and instead of the terms "preemption" and "homestead" there was substituted the term "claim", a term more readily construed as referring to the interest or estate of the settler, but obviously not substituted for the purpose of changing the substance of the section as originally enacted.

And so, we submit as sound the view expressed by Judge DIETRICH (p. 72); "What rights the railroad "company may have in case its grantor, an entryman, "abandons his entry, need not at this time be deter- "mined; that may be a matter of future concern to "the defendant, but it is of no present interest to the "plaintiff. For if we adopt the view least favorable "to it, and hold that it is not a grantee, but only a "licensee, still as a licensee merely, the defendant's "present occupation and use are fully authorized by "law, and the plaintiff's contention that it is a tres- "passer must therefore fail."

2.

After Forfeiture of the Homestead.

The fact that the land will revert to the government and resume its former character of public land in the event of the forfeiture or abandonment of the

settler's homestead gives the government no right to present injunctive relief. If, however, the Court deems it proper in this case to enter upon a consideration of the relative rights of the parties in the event of the cancellation of some of the homestead entries and the reversion of title to the Government the following argument is submitted :

The purpose of Section 2288 is not confined to the benefit which the individual homesteader may derive from the exercise of the power conferred thereby, but is primarily the public benefit, local or more extensive, which may result from the public enterprise in furtherance of which such a grant is made. This statute in respect of the power to grant railroad rights of way is in line with the broad policy of the Government to encourage railroad construction, evidenced by the numerous railroad land grants of that time. It was enacted March 3, 1873, after the majority of special right of way and railroad land grant acts had been enacted and only two years before the enactment of the general right of way Act of 1875. In view of the policy of the Government then prevailing, it cannot be doubted that the intention was that this Act should operate as the Government's consent in respect of its possible reversionary interest in the land covered by the homestead or other settlements. It cannot be believed that the conveyance which the settler was empowered to make created only an estate in a right of way limited by the estate of the settler, and subject to forfeiture upon the forfeiture of the settler's rights ; such a belief is prohibited by a consideration of its absurd results. If the right of way acquired from the settlers be subject to forfeiture upon the failure of the entryman to perform

the conditions entitling him to a patent, the power to convey given the settler by the statute would be useless, for no sane grantee would construct a railroad under so precarious a tenure. In the case of the homestead entry, the settler's occupation of the land must continue for five years under the general homestead law before he is permitted to make final proof. Therefore, the beneficiary of a homestead settler's right of way grant would be obliged to await the lapse of five years before devoting the right of way to the use for which it was intended or to incur the risk of the loss of its investment through the failure of the settler to perfect his title.

In this connection it is pertinent to consider the provisions of Section 3 of the general right of way Act of 1875 for the condemnation of private lands and possessory claims in connection with the location of a railroad. Section 3 was intended to provide for the acquisition of right of way by condemnation over sections held subject to homestead and similar entry, both private lands and possessory claims being subject to condemnation under this provision. Certainly it was not contemplated that the right of way condemned in such cases should be measured by the estate of the entryman or mere possessory claimant occupying the land. The condemnation section of the general right of way Act and the power conferred by Section 2288 are equivalent in their scope and the same considerations are applicable in each case as to whether the reversionary or contingent interest of the Government is subordinated to the right of way acquired by voluntary conveyance of the settler under Section 2288 or by condemnation against the settler under the Act of

1875. The general right of way Act evidenced the consent of the Government in respect of its interest to exactly the same extent that Section 2288 evidences such consent, and for the same reasons. It must have been the intention of both Acts that the power to acquire a right of way, by conveyance in the one case, by condemnation in the other, should foreclose the interest of the Government, for otherwise the powers were nugatory. Judge DIETRICH said below, page 72, that there is no reasonable ground to suppose that the Government was unwilling to grant rights of way over lands in which the interest of the Government was limited, in view of its free grants of rights of ways over lands where the Government was the owner of the entire interest.

We have found no case in which the Government has asserted a right to oust a railroad claiming a right of way by grant from settlers whose rights have subsequently been forfeited.

In *Alexander vs. Kansas City, etc., Railroad Company*, 138 *Missouri*, 464, it appeared that one Simpson having a homestead settlement had conveyed a right of way to the defendant railroad in 1881; that the railroad's map of definite location had been filed and approved, but did not describe the land in question as vacant public land over which a right of way was sought; that subsequently after the construction of the railroad Simpson abandoned his homestead and his claim was cancelled by the Land Office, and that a new homestead was then initiated and patent obtained by the plaintiff and ejectment suit brought on the theory that the right of way of the defendant terminated with the cancellation of the Simpson homestead. The Court said, page 471:

"What now was the position of the defendant? When "it sought to obtain its right of way it was precluded "from describing this land as vacant because of the "possession of Simpson a homesteader with an in- "choate right. It was directed by the Government to "deal with this homestead tenant for a right of way "through his equitable estate. This it did and pur- "chased a right through the inchoate homestead. Is "it to be told now, when the homestead tenant's right "fails, that the Act of Congress did not operate to "grant the right of way over this land to which the "United States held the title, and the title to which "never passed out of the Government? We think "not. We think that the United States by the Act "of March 3, 1875, must be held to have "donated all its interest in the right of way upon the "approval of the articles of incorporation and map of "definite location, subject to the contingency of the "homestead tenant perfecting his title, and if he failed "to do so, immediately upon his abandonment, a per- "fect title accrued to the Railroad Company as against "the United States and as against any person who "had not then a possessory right thereto."

While we believe that the result reached by the Missouri court was correct and inevitable, we do not agree in all respects with the process of reasoning by which the Court reached its result. We do not believe that the fact that the defendant in that case had secured the approval of a map of definite location had anything to do with the matter. That map purported to relate and could operate only as to lands which were public lands, and the Simpson land had been segregated by his homestead entry from the public domain.

Jamestown and Northern Railroad Company vs. Jones, 7 No. Dak., 619; 76 N. W. Rep., 227, did not actually involve any question of conveyance from or condemnation against a homestead settler, but in considering the application of the Act of 1875 in the case of lands covered by entries subsequently abandoned, the North Dakota Court employed reasoning similar to that of the Missouri Court above quoted, viz.: "But, as "against the United States, the grant is as effective in "cases where the land has been entered as where it has "not. Under any other view of the statute, the rail- "road company might be compelled to condemn succes- "sive rights of settlers, only to find that its proceed- "ings were futile, because in each case the settler's "rights were, by cancellation or abandonment, de- "stroyed. We think that it was the purpose of con- "gress to make the grant operative as against the "Government, subject only to existing rights of settlers, "and that the question whether a particular piece of "land was within the terms of the grant, so far as the "Government was concerned, was not to depend upon "the freedom of that land from settlement at the "time the map was approved. Under this view of "the statute, a railroad company could never be re- "quired to condemn any other than existing rights. "When those should once be condemned, the destruc- "tion or abandonment thereof, followed by a new entry, "would not force the grantee to assume anew the "burden of condemning subsequent rights, and meet- "ing with a similar experience, to take up again, "perhaps, the Sisyphean task of toiling hopelessly for "title, only to find each time that all its efforts had "proved abortive." The reversal of the decision in the *Jamestown and Northern* case by this Court in 177

U. S., 125, did not affect the point to which the part of the opinion above quoted related.

If it were the law that the right of way obtained from a settler could not survive the termination of the settler's estate, solely by virtue of the provisions of Section 2288, we believe that the difficulty foreseen in that situation could be solved by the theory that the actual construction of the railroad over the homestead would, upon the forfeiture of the homestead, satisfy the requirements of the general right of way Act. Section 1 of the general right of way Act grants a right of way over the public lands to any railroad company which shall file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization. This filing, which has been complied with by the Railroad Company in the present case, qualifies the railroad company as a grantee under Section 1, and nothing further is necessary except to identify the right of way by its definite location. Section 4 provides for the filing with the register of the land office, after the location of any section of twenty miles of railroad, of a map thereof, after the approval of which by the Secretary of the Interior and a notation upon the plats in the land office "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." In *Jamestown & Northern Railroad Company vs. Jones*, 177 U. S., 125, this Court held that the right of way was definitely located under the general right of way Act by actual construction of the road, entitling the company to the benefit of the present grant of a right of way made by Section 1 of the Act as against a settler who had made settlement after the construction of the road but before the filing

and approval of any map; and that the purpose of Section 4 as to the filing and approval of a map was merely to provide a method of fixing the location of the right of way and appropriating the same *before* actual construction of the road. This decision approved in all respects a decision to the same effect made by Secretary Vilas in *Dakota Central Railroad Company vs. Downey*, 8 Land Decisions, 115. In other words, the benefit of the right of way over public lands offered by the Act of 1875 may be obtained either by an actual construction of the road, or, in advance of construction, by filing a map of the road as provided in Section 4, the actual construction being deemed unmistakable evidence of appropriation. The decision in the *Jamestown & Northern* case was referred to and followed in *Stalker vs. Oregon Short Line Railroad Company*, 225 U. S., 142. In view of the law, as established by these decisions, a right of way acquired by a railroad company by conveyance from a homestead settler under Section 2288, or by condemnation, and followed by actual construction of the railroad would, immediately upon the forfeiture of the homestead, continue in effect as a right of way over the land as public land in entire accord with the provisions of the general right of way Act. This theory, we say, would be applicable if it were necessary, as thought by the Circuit Court of Appeals, to satisfy as to the Government's reversionary interest the provisions of the general right of way Act. It would satisfy also the evident belief of the Missouri and North Dakota courts, in the cases above cited and quoted, that upon the forfeiture of the rights of a settler, from whom the railroad company had acquired a right of way, some proceeding must have been taken

to secure the benefit of the right of way as against the government, both those cases adverting to the filing and approval of a map as securing such right.

But it seems to us obvious that the view that the general right of way Act must be satisfied in the event of the termination of the settler's estate is without foundation. The correct answer to this view is that the grant in Section 2288 of the power of conveyance by settlers, and the grant in Section 3 of the Act of 1875 of the right of condemnation, each evidences a final and complete consent of the government to subordinate its reversionary interest to the use of the land for the public purpose involved. And this is made clear by the consideration that Section 2288 does not concern merely the grant of railroad rights of way but includes conveyances for church, cemetery, school and other purposes, with which the right of way Act of 1875 is not concerned. All these public purposes stand upon an equal footing. It must have been the intention that Section 2288 should operate to make a conveyance by a settler of a site for a church, school or cemetery good and effective against the Government's reversionary interest, even after the forfeiture of the settler's rights, for there is no provision for securing a right to maintain the church, school or cemetery upon the public lands. And, if this is true, by the same process of reasoning it must be concluded that the railroad right of way conveyed by a settler is not limited to the life of the settler's entry but is effective, by virtue solely of the Government's consent evidenced by Section 2288, as against the Government's reversionary interest.

POINT IV.

The dictum of the Circuit Court of Appeals that the general right of way Act requires the filing of a profile of the road rather than a map of alignment or definite location is contrary to the practice of nearly forty years.

The Circuit Court of Appeals said in this case (page 210): "It is to be observed that the map required "to be filed with the register of the land office and ap- "proved by the Secretary of the Interior by the Act "of March 3, 1875, is a profile of the road. This is "something more than an alignment map or a "map of definite location. A profile is 'the "outline of a vertical section through a country or "line of work, showing actual or projected elevations "and hollows.' (Standard Dictionary.) 'A drawing "exhibiting a vertical section of the ground along a "surveyed line, or graded work, as of a railway, show- "ing elevations, depressions, grades, etc.' (Webster's "In. Dictionary.) 'A vertical section through a work "or a section of country, to show the elevations or de- "pressions.' (Century Dictionary.) With a map of "this character before the Secretary of Interior show- "ing the contour of the projected line of railroad "through the public lands included in an irrigation "and reclamation project, he can determine whether "the construction of such a road would interfere with "the project. He can determine also whether suitable "provision has been made for the crossing of canals "and other waterways, and, if not, what provision "is required to preserve the work of the reclama- "tion service from encroachment and impairment."

There was no issue before the Court as to the character of the map required to satisfy the conditions of the general right of way Act, for it was conceded that no map whatever had been filed by the Railroad Company in this case. No proposition of this sort had been made in behalf of the Government either in the Circuit Court or in the Circuit Court of Appeals. The above quoted gratuitous pronouncement of the Court is in conflict with the uniform construction of the Act by the Department of the Interior and contrary to the practice followed in right of way cases continuously since the Act of 1875 became a law. Necessarily, therefore, this dictum has created doubt and confusion, and we deem it proper to suggest that an expression of the dissent of this Court therefrom, however unnecessary to the decision of this case, would be of great service and benefit, by relieving the existing doubt and confusion.

It is true that the term used in Section 4 of the Act of 1875 is "profile". It is also true that in its strictly literal sense the term "profile" refers to a drawing of a vertical section. But a profile alone of a railroad proposed to be constructed over the public lands would not answer the purposes for which the filing of a map was required. The object of the requirement of Section 4 is to secure a map showing the *location* of the proposed road, so that its location on each subdivision of the public lands may be noted on the plats, primarily as a notice of record to those desiring to enter the public lands under various land laws. A map of alignment alone will answer these purposes.

In *Dakota Central Railroad Company vs. Downey, 8 Land Decisions, 115*, decided in 1899, Secretary Vilas said (pages 118 and 119): "That 'location' must

" precede construction ; and it must also precede the " filing of a profile, which is only another phrase for a " map of definite location—a phrase frequently used " in acts granting lands in aid of the construction of " railroads."

The regulations of the Department issued under the Act of 1875, as revised from time to time, have expressly required a map of alignment rather than a vertical section map or profile. In the regulations issued February 11, 1904, *32 Land Decisions, 481*, it is provided in Section 6, page 485 : " The word profile " as used in this act is understood to intend a map of " alignment."

We submit that this is one of the cases in which the construction adopted and uniformly maintained by the governmental department vested with the administration of the law should be accepted as conclusive.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and the decree of the Circuit Court affirmed.

Respectfully submitted.

September, 1914.

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APPENDIX.

Right of Way Act, Approved March 3, 1875 (18 Stats. 482).

An Act Granting to railroads the right of way through the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

SEC. 3. That the Legislature of the proper

territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to

such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Excerpt from General Appropriation Act, approved August 30, 1890 (26 Stats., 391).

"For topographic surveys in various portions of the United States, three hundred and twenty-five thousand dollars, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October second, eighteen hundred and eighty-eight, entitled 'An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes,' as provides

for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located, or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

"No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be ex-

pressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."

Section 2288 Revised Statutes as Amended by Act Approved March 3, 1905 (33 Stats., 991).

"Any bona fide settler under the preemption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim."

Reclamation Act, Approved June 17, 1902 (32 Stats., 388).

An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

Be it enacted by the Senate and House of

Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above states set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: *Provided*, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the

requirements for the support of agricultural colleges in the several States and Territories, under the Act of August thirtieth, eighteen hundred and ninety, entitled "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

SEC. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

SEC. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contem-

plated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this Act.

SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon the lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which

such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agicultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is sit-

uated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act.

SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided*, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

SEC. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act

shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

SEC. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this Act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semi-arid lands within the limits of such State or Territory: *Provided*, That the Secretary may temporarily use such portion of said funds for the benefit of arid or semi-arid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this Act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

SEC. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and

regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

MINIDOKA & SOUTHWESTERN RAILROAD Company and Utah Construction Company, appellants, v. THE UNITED STATES.	No. 19.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On November 17, 1902, the Secretary of the Interior, under authority of the reclamation act of June 17, 1902 (32 Stat., 388), withdrew for reclamation and entry under that act alone, certain public lands in Lincoln and Cassia Counties, Idaho. This withdrawal has continued in force to the present time. A portion of the land so withdrawn was later included in the Southside Minidoka pumping project. Funds were allotted by the Secretary of the Interior, work was commenced, and, prior to any attempt by the defendant

railroad company to initiate rights upon the lands within the project which are now in controversy, a number of main and lateral irrigating canals were completed and put in operation. At the time of the hearing in the Circuit Court the Government had expended a sum in excess of $1,300,000 upon this project (R., 93), the nature and administration of which will be found fully described in the Fifth Annual Report of the Reclamation Service, and reports subsequent thereto.

The defendant railroad company, as appears by its articles found in the record (R., 158), was incorporated in January, 1904, under the laws of Idaho, to operate a line of steam railroad extending from Minidoka, in Lincoln County through Burley, in Cassia County, to Buhl, in Twin Falls County, of that State. As appears by its answer (R., 45), this, constituting its main line, has been constructed and is now being operated by the Oregon Short Line Railroad Company. The original articles were tendered to the Land Department in April, 1904, were declared "satisfactory in form," and were "accepted for filing" under the general railroad right-of-way act of March 3, 1875, 18 Stat., 482. (R., 156.) In March and November, 1908, and again in July, 1909, the company's articles were amended to allow the construction of branch lines, including an extension of its main line, southward into the State of Nevada. (R., 166, 171, 194.) These amendments appear to have been subsequently tendered to the Land Department and

there received, like the original articles, as satisfactory in form. (R., 155, 190.) By the amendment of July, 1909, a line of railroad was projected to extend from the town of Burley, situate on the main line at the Snake River, southerly to the town of Oakley, a distance of 25 miles. It is conceded that for this branch no profile or map of location was ever filed with or approved by the Secretary of the Interior under the general railroad act of 1875, or otherwise. The line was laid out by the company in the summer of 1909 and, as thus located, passed directly through the area withdrawn by the Secretary of the Interior for reclamation, traversing a number of the farm units, and intersecting in its course 3 of the main canals and 10 of the lateral canals which had been constructed and were being maintained and operated by the United States. The lands so traversed had been filed upon by settlers under the reclamation act, and the railroad company, before undertaking construction work, procured deeds from all but one or two of these entrymen, purporting to convey the right of way across their tracts. But neither at the dates of these conveyances nor at the time of the hearing of this cause in the Circuit Court had any of the entrymen made final proof under the homestead laws or paid any part or installment of the cost of the reclamation works.

The railroad company appears to have begun construction work through the other appellant, Utah Construction Company, in November, 1909, and to

have made some progress therein until December 11th following, when the work was suspended on account of the frost and snow. (R., 32.) The bill was filed on December 29th, and the Government's motion for a preliminary injunction was refused. (R., 60.) It appears that the grading had been substantially completed at the time of final hearing, in June, 1910, but that no ties or rails had been laid. (R., 111 *et seq.*) There are on the irrigated area several hundred miles of main canals and laterals already constructed. (R., 102.) By extension of the existing pumping system 8,000 acres can be added to the reclaimed lands. This, however, would require at least one more main canal and possibly a half dozen laterals (ib). Several hundred acres of this land are below the railway location, so that the road must be crossed at increased expense to perfect the water distributing system. (R., 105.) The lands actually occupied by the railway are irrigable and valuable for agriculture. The railway, of course, withdraws them from agriculture and the railway construction diminishes or destroys their value for that purpose. (R., 94.)

The District Judge both on the preliminary motion and at final hearing, was of the opinion that the Government was entitled to no relief other than the protection of its existing canals where crossed by the railroad. (R., 60, 122.) *United States* v. *Minidoka & Southwestern R. R. Co.*, 176 Fed., 762. Accordingly a final decree was entered (R., 79) in which the structures to be erected and maintained

by the railroad company at such crossings were specified, but relief was otherwise denied to the complainant.

Upon appeal the decree was reversed by the Circuit Court of Appeals with instructions to grant the injunction as prayed, to continue until the court shall be advised that the construction of the railroad has been assented to by the United States as well as by the settlers whose lands are traversed thereby, the evidence of the consent of the United States to be "the approval of a profile map of the right by the Secretary of the Interior." (R., 203.) *Minidoka & Southwestern R. R. Co.* v. *United States*, 190 Fed., 491.

The case involves the construction of the act of March 3, 1873 (17 Stat., 602), compiled as section 2288 of the Revised Statutes and reenacted with amendments on March 3, 1891 (26 Stat., 1097), and March 3, 1905 (33 Stat., 991), which purports, among other things, to permit bona fide settlers under the preemption, homestead, and other settlement laws to transfer by warranty against their own acts portions of their claims for railroad rights of way; the general railroad right-of-way act of March 3, 1875 (18 Stat., 482), and the reclamation act of June 17, 1902 (32 Stat., 388). All of these acts are correctly printed in full in the appendix of the appellants' brief, so that it is unnecessary for us to reproduce them *in toto*, but relevant portions will be quoted at the proper places as our argument proceeds.

RÉSUMÉ OF APPELLANTS' ARGUMENT.

All of the lands in controversy are covered by the filings of claimants under the reclamation law. This fact led the trial court to hold the general railroad right-of-way act inapplicable, upon the theory that lands subject to such inchoate private rights are not "public lands" within the intent of that statute. The act of 1875 having thus been removed from the case, the railroad company's intrusion within the reclamation project was held justified by the conveyances which it had secured, and presumably would secure, from the particular settlers whose claims were traversed by the location, the trial court being of the opinion that by Revised Statutes, section 2288, these farmers were fully authorized to grant a right of way effective at least while their entries were in good standing, and declining to decide what would happen to the title if the entries themselves should be subsequently forfeited or abandoned. Appellants stand squarely upon this somewhat remarkable doctrine that the entrymen, by an act originally passed in 1873, and whose purpose in this regard was manifestly unaltered by the amendments, were commissioned with the serious duty of weighing the advantages and disadvantages of railroad construction and railroads to a project in the active care and management of the Government—a project adopted pursuant to a policy which was not conceived until nearly 30 years after that act was

passed, and involving the expenditure of enormous sums of public money and the happiness and fortunes of hundreds of settlers and their families. The appellants, in their brief, go even farther than the trial court, since they argue that the conveyances of these few farmers will operate, either alone or in connection with the mere filing in the Land Department of the railroad company's articles and proofs of incorporation, to convey a permanent right of way, independent of the future standing of the reclamation entries.

THE GOVERNMENT'S POSITION STATED.

The opinion of the Circuit Court of Appeals (R., 203), in which the three judges united, points out very clearly that, although lands of the United States which are subject to the filings or inchoate claims of individuals may not be "public lands" in the sense of some granting statutes, they are such in the sense of the general railroad right-of-way act of 1875, inasmuch as that act itself makes mention of them and specifically provides the means whereby the interests of such possessory claimants may be condemned. That court therefore, being also of the opinion that lands withdrawn for entry under the reclamation law do not fall within the terms of the fifth section of the act of 1875, which excepts from its operation "any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale,"

holds that the company's rights, as against the Government, must depend entirely upon a compliance with that statute. It regards the act of 1873 as a companion piece of the act of 1875, the latter providing the means whereby the company may obtain title from the Government through public lands, whether filed on or not, and condemn possessory rights, and the former affording a way whereby the company may acquire, *pro tanto*, the interest of the settler, by agreement, without resort to a proceeding in condemnation.

> These two statutes [says the opinion], taken together, appear to meet the requirements of the situation, and to authorize the railroad company upon complying with certain conditions to acquire from both the Government and the settler a right of way which the Government should not in justice to the settler grant without his consent, and which the settler could not convey without the permission of the Government, since he can only "transfer by warranty against his own acts." (R., 207.)

Thus the Court of Appeals in effect rejects the idea that by the act of 1873 a mere possessory claimant is authorized, at his pleasure, to grant a railroad easement, whether permanent or conditioned upon the persistence and perfecting of his entry. Its decision turns finally upon the proposition that, as against the Government, the railroad company, dependent as it is upon the act of 1875,

acquires no right until the profile map of its line has been filed with and approved by the Secretary of the Interior, as that act prescribes.

Our position accords perfectly with the argument and conclusion of the learned court below, save in this one particular: We argued before that court and we respectfully insist here that lands withdrawn for irrigation and settlement under the reclamation act do not fall within the purview of the act of 1875 at all, except in so far as the Secretary of the Interior is empowered to modify their status under the reclamation act itself. The act of 1875, as we have seen, by its fifth section excludes all lands of certain described kinds of reservations and all "other lands specifically reserved from sale." We contend that the lands of a reclamation project fall within the spirit, if not the letter, of this exclusion; they are "specifically reserved from sale" in the true sense of the statute. The learned court below seems to have assumed (R., 206, 207) that such lands are offered for *sale* in the usual sense of the term. It is true, as indicated by the title of the reclamation act which the opinion quotes, that the lands are reclaimed by moneys derived from the sale of public lands; but those, of course, are other lands disposed of under other laws. The tracts reclaimed are not sold; they are disposed of under the homestead law, minus the commutation provision, and the reclamation law; the entryman acquires them by residence and culti-

vation, and by restoring to the Government his pro rata share of the cost of constructing, maintaining, and operating the works. The private owner in the project pays in the same way and at the same rate as the entryman. The act of 1875 was meant to apply only to those public lands which were on the market, or otherwise subject to be disposed of, under general laws, free of any retained interest or responsibility upon the part of the Government. Such are not the lands in the reclamation projects. The Government, as will be shown more fully in the course of our argument, has a peculiar interest and a peculiar responsibility touching all of the lands of such a project as long as the project is *in fieri* and until the duty of the Government to manage it and perfect it has been fully performed. We incline to the opinion that the Secretary of the Interior, by virtue of the broad powers which he possesses under the reclamation act, may be authorized in his discretion to release lands from withdrawal to the extent necessary for the granting of a railroad right of way through the irrigable areas, if he thinks that a railroad may be constructed and operated there without harm to the project as a whole. But even if this be unsound, supposed need of railroads in such places can afford no excuse for stretching the legislation providing for rights of way across the ordinary public domain.

Finally, as held by the learned court below, the act of 1875, if applicable to these lands, requires the beneficiary to file a "profile" or a map of defi-

nite location, and requires the approval thereof by the Secretary of the Interior before any right under the act can vest as against the Government. Manifestly the appellant company has acquired no standing under that statute, and it is doubtless due to the certainty of this proposition that opposing counsel practically stake their entire case upon the conveyances of the settlers.

ARGUMENT.

I.

The right to build and operate a railroad through a reclamation project without consulting the Government should not be adjudged to exist unless plainly conferred by some act of Congress.

The act of 1875, when complied with, grants a way over the ordinary public lands, but even this, as we shall seek to establish, is dependent upon the approval of the Secretary of the Interior, the guardian of the people's interests in the public domain. (*Knight* v. *Land Ass'n*, 142 U. S., 161, 181.) Here the railroad company advances the remarkable contention that railroads may be laid out *ad libitum* through all of the vast and complex reclamation projects, over land which is specially reserved and dedicated to a special form of use and disposition and for the accomplishment of definite results of the utmost public importance, if only a few of the settlers, upon being paid to their personal satisfaction, will vouchsafe their consent. This court has

recently had occasion to inquire quite deeply into the objects and mechanism of the reclamation policy (*Swigart* v. *Baker*, 229 U. S., 187), so that it is hardly necessary for us now to do more than refer to a few prominent features. The plan requires active care and management of each project by the Secretary of the Interior until the cost has been largely repaid to the Government. Entrymen do not acquire any title or control until that has been done, and not even then do they gain control of the irrigation works. The projects include enormous areas of arid or semiarid land, and involve the expenditure of enormous sums of public money for the irrigation of these areas.

The peculiar plan of the legislation is to accomplish reclamation and establish large communities of prosperous farmers through the lending of public funds. The farmers are expected to pay back the entire investment in the end, and the trust in their ability to do this is largely founded upon the assumption that by a careful management of the project during the earlier stages of its operation, while it remains under the control of the Government, and by allowing ample time, the farms will become very productive and render to the settlers a sufficient profit to enable them to meet the assessments as they accrue. Thus the whole success of a project—the return of the Government's investment and the prosperity of the farmers who are liable therefor—must be dependent upon the care with which it is conceived and executed while the

Government is in charge. Now, the complexity of the problem is as obvious as its importance, and any doctrine which tends to diminish the discretionary power of the Secretary of the Interior to deal with it in all of its aspects should be scrutinized with the utmost caution before it is adopted by the courts. It will be perceived at once that the construction of even one railroad through a reclamation project *might* be productive of very serious injuries. The irrigable lands are frequently divided into tracts which are quite small, the policy being to encourage intensive cultivation and to limit each entry to an area which will suffice to support a family. To bisect a small irrigated farm or orchard by the grades and cuts of a railroad might spell the difference between success and failure for its owner, according to the degree in which his access and his ability to irrigate effectively were curtailed. The Government not only holds the fee of the land but is directly interested in the use that is made of it. If an injury is done to the farming efficiency of any of the irrigable units the capacity of that unit to supply the funds which the Government is obliged to collect is to that extent impaired, with the possibility of loss to the Government or the other settlers. Hence, in exercising his broad discretionary functions under the reclamation act, the Secretary of the Interior would not be performing his duty if he permitted each farmer to do as he pleased with the tract intrusted to his possession, especially as, in an area dependent upon irrigation, a thing done upon

one tract may work havoc not to that tract alone but to many others also and to the project as a whole. It is even within the realm of possibility that the existence of a railroad might prohibit the extension of a canal upon which the reclamation of a large area of arid lands depends. In this very case, there is evidence tending to show that the railroad, if constructed, may seriously hamper the future development of the project.

Manifestly it would not be reasonable to leave the decision of such important matters to the settlers over whose allotments the railroad is projected, and to whom the company offers its money by way of compensation for what *they* are supposed to give up. They do not share the responsibility of the project management. They may not even be expected to know or consider what will be the effect of the railroad construction upon the lands of others or the project as a whole. They may be incompetent; they may be dishonest. It would not do to regard them as representing the Government or their fellow settlers in any respect.

The appellants' response to such suggestions as these is to remit the Government to the courts for the protection of its rights when invaded. But this is taking powers and responsibilities away from the executive, where they distinctively belong, and lodging them with the judiciary. The substitution is unwise and vicious, and the more so because necessarily it would not be complete and cover all cases wherein a remedy might be needed. Would

the court undertake to decide whether or not a railroad through a reclamation project is necessary or desirable? Or whether, for the success of the project, it would be best to have it located here or there? Or how many lines of railroad through the same project would be convenient and tolerable? Would it limit its relief to the protection of the existing canals, as was done in this case, or would it also insure the Government against the pecuniary loss that would arise from injuries done directly to the units traversed, and indirectly to the other units of the project? Would it attempt to forecast the effect of one railway or two or a dozen upon the success of the project and the repayment of the Government loan? All these things, and many other considerations which might be suggested, are obviously not of judicial cognizance. The relations of railroads to reclamation projects present a complex of engineering, agricultural, and economic or business problems which could neither be adequately explained nor suitably resolved in litigation. It will not assist the Secretary of the Interior to perform the very serious and complicated duties laid upon him by the reclamation act to pare down his discretionary authority, to cut away powers which should normally be vested in him as the general agent of the Government and transfer them to private individuals whose use of them may be selfish and unwise and subject to only a limited control by the courts. The statutes upon which the railroad company relies should be construed to avoid

this evil, if possible; if necessary, they should be *strictly* construed; for though it may be conceded that to help their obvious purpose a fairly liberal construction may be accorded to such acts, yet where it is sought to extend them beyond this, so that they may work interference and injury to the operations of the Government itself, subjecting even the public investments to the safe-keeping of railroad corporations and homestead settlers, this liberal doctrine should give way to the doctrine of strict construction.

The expediency of having the railroad made and operated, and the thought that without recourse to the settlers' conveyances there would be no way in which the work could be authorized, appear to have made an influential appeal to the mind of the learned district judge. But we think the argument *ab inconvenienti* can be applied more strongly from the other side. The inconvenience and dangers of allowing railroads to be run through the reclamation projects without any responsible supervision are too obvious for discussion. If a railroad is needed, or can be constructed and operated without harm to a project, it may be assumed that the Secretary of the Interior will approve it if he has the authority to do so. If he has not, his disability assuredly is no reason for lodging so extraordinary a power in a few of the settlers. The defect should be supplied by Congress, and the railroad may well wait until Congress has acted.

II.

The act of March 3, 1873, as amended, does not empower the entrymen to authorize the construction of a railroad through a reclamation project without the consent of the Secretary of the Interior.

1. *History and general purpose of this legislation.*

As originally enacted on March 3, 1873, this statute was as follows:

> That any person who has already settled or hereafter may settle on the public lands of the United States, either by preemption, or by virtue of the homestead law, or any amendments thereto, shall have the right to transfer by warranty, against his or her own acts, any portion of his or her said preemption or homestead for church, cemetery, or school purposes, or for the right of way of railroads across such preemption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their preemptions or homesteads. (17 Stat., 602.)

It passed into the Revised Statutes (section 2288) without substantial change, as a part of the chapter on "Preemptions."

By section 4 of the act of March 3, 1891 (c. 561, 26 Stat., 1097), this section, with others relating to preemptions, was repealed; but by section 3 of the same act (*ib.*) it was reenacted so as to read:

> Any bona fide settler under the preemption, homestead, or other settlement law shall have the right to transfer, by war-

> ranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim.

By the act of March 3, 1905 (33 Stat., 991), the section was again reenacted, without change beyond the introduction of the words "telegraph, telephones," after the word "railroads."

The general purpose of the act was undoubtedly to legitimate a broader use of the settler's *possession* than was authorized by the settlement laws. Those laws in effect forbade him to transfer any part of his interest whatsoever, and visited his claim with a forfeiture if he did so. The object of this act was to relax this stringency. Corroboration of this is found in section 2291 of the Revised Statutes, part of the homestead law, which provides that a claimant in his final affidavit must state that no part of the land has been alienated "except as provided in section twenty-two hundred and eighty-eight."

See *Cascade Pub. Service Corporation* v. *Railsback* (59 Wash., 376).

The amendments added new uses, and extended the privilege to include new species of settlements, but it will not be contended, we assume, that the general purpose was altered in its character so as to subject the public interests of the Government to a

power of the private claimant which would not have existed under the original act.

2. *The act merely authorizes the settler to relinquish in part the privileges which he enjoys under the settlement law, not to convey the title or to impair in any way the interest of the Government.*

This proposition naturally divides into two others: (*a*) That the settler is allowed to relinquish his own possession merely, and is not constituted an agent to act for the Government in disposing of more; and (*b*) that where the settler's interest is so commingled with the Government's interest that a proposed enjoyment of the one would be detrimental to the other, the act is necessarily inapplicable.

(*a*) In *Davis* v. *Foreman* (14 L. D., 146, 152), a decision by Secretary Noble, it is well said:

> It is merely repeating a truism, to say that the homestead law was enacted for the benefit of those seeking homes upon the public domain; the theory of the law is, that the land thus entered is to be used and retained as a home, as a place of abode for the entryman and his family.
>
> * * * * *
>
> In that provision of the law which requires a claimant to make affidavit that no part of the land has been alienated, it must be assumed that the word "alienated" was used in its ordinary acceptation, and that the intention of Congress was to prevent the transfer of possession of the lands embraced

> in the entry, to another party, the lands were to be retained in the possession of the entryman for his home and for the support of himself and family. This view is clearly sustained by the provisions of section 2288, Revised Statutes; which permits an entryman to transfer, by warranty against his own acts, any portion of his homestead for church, cemetery or school purposes, and for the right of way of railroads across such homestead and such transfer shall in no way vitiate the right to complete and perfect title to his homestead. In these cases the entryman has not transferred a portion of the land embraced in his homestead, because *the fee is not in him and may never be, he has simply transferred his right of possession* to that portion of his entry both while the title remains in the Government and after it has passed to him; but the law provides that his right of transfer or alienation of possession of a portion of his claim shall cease at this point, and if he attempts any further transfer or alienation, he shall be prohibited from completing title to the land embraced in his entry.

We are not aware that this authoritative construction has ever been questioned in any other decision of the Land Department or of the courts. The construction is reasonable and in perfect fit with the statutory language. It is not to be presumed that Congress would confer upon possessory claimants an unrestricted authority to burden the

fee of the Government. Express words would be required for this. And the words used are actually indicative of a contrary purpose. The act does not purport to grant anything; it merely permits the settler to make transfers "by warranty against his own acts" which shall not vitiate his claim. He is permitted to transfer "any portion of *his claim*" (*Eimer* v. *Wellsand*, 93 Minn., 444, 447); he is not made an agent to convey the Government's fee. When Congress intends to convey a vested interest in the public lands it invariably does so in express words or authorizes some executive officer to do so. If we take the letter of this statute it merely empowers the settler to yield a portion of his possession; to transfer that which is already his but which he may not pass over to another without this express authorization. And this first, or literal, meaning corresponds with a purpose which is obvious and which fully suffices to explain the enactment. Any larger intendment, therefore, could only be justified upon the score of convenience, which would be no justification at all. It may be more convenient to the uses mentioned to devest the Government of its fee, but the retention of the fee is not inconsistent with the uses. It may even be of convenience to the Government.

(*b*) The act is no authority for a settler to transfer, even for one of the uses specified, if, because of the peculiar status of his holding, the new use would clash with a governmental interest. This

proposition is closely related to the one next following, but the two are not the same. Our suggestion here is that while the possession and usufructuary right of the ordinary homestead settler are broad enough to cover any of the uses mentioned in this act if attempted by the settler himself, and while, therefore, such a settler in transferring for such uses is but transferring an interest or privilege which was already within the potential scope of his claim, the possession of the settler under the reclamation act is more narrowly conditioned. He himself could not lawfully perform acts upon his tract which might tend to interfere seriously with the governmental care and administration of the project. Consequently he could not "transfer" such a right to anyone else under this statute.

3. *As to lands which, like the lands of reclamation projects, are affected by a special public interest, the act of March 3, 1873, if applicable at all, should be construed as a means of securing the consent of the settler to the uses mentioned, but not to permit those uses in the absence of governmental approval.*

(*a*) It may be doubted whether this statute has any application whatever to holdings of this character, since it has always been the policy of Congress, in disposing of the public domain, to except those parcels which have been reserved or which have been devoted to governmental activities, and we believe it to be the settled doctrine of this court

that such an exception will be presumed if it is not expressed.

Wilcox v. *Jackson*, 13 Pet., 496, 513.
Scott v. *Carew*, 196 U. S., 100.

When this law was first enacted there were no public land laws under which it was possible for private and public interests to become so interblended as they are in the reclamation homestead entries. All of the lands which then were subject to private entry were lands which the Government was willing and was offering to dispose of outright to purchasers and settlers; and what the settler did upon his claim, or what he permitted others to do, was of no consequence to the Government, if it did not violate the terms of the settlement laws or amount to the commission of waste. This statute should be construed in the light of the conditions which existed at the time when its purpose was conceived. It should be construed in the light also of the "homestead law" and the "settlement" laws of that time. This necessarily excludes the reclamation act, which is a settlement law, not *ejusdem generis*, but very different in kind from any known or contemplated when the act was passed, and evidences a policy not developed until years afterwards.

The construction adopted by the Circuit Court cleaves to the bare letter while ignoring both the limited purpose of the act construed and the invariable policy of Congress to save the special inter-

ests of the Government from its grants of the public domain.

4. *Construed in pari materia with the reclamation act, the act of March 3, 1873, as amended, can be deemed operative only in so far as consistent with the proper management and welfare of such projects. This necessarily implies that the transfers of the settlers must remain ineffectual if not approved or if objected to by the Government through the Secretary of the Interior.*

Hitherto we have assumed that the original purpose of the act of 1873, in the aspect here involved, was not altered by the amendments. Let us now assume March 3, 1905, as the date of origin, three years later than the reclamation act. The public land laws are all *in pari materia;* no particular statute should be construed as an insulated act, upon its own letter, but all should be construed together as an harmonious system. The reclamation act puts upon the Secretary the duties of planning, constructing, maintaining, and operating the projects, and of collecting the cost thereof, and expects him, at the proper time, to turn each project over to the water users "as a going concern." (*Swigart* v. *Baker*, 229 U. S., 187, 197.) He is given the full responsibility of executing the act, and is expressly thereby "authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full

force and effect." Reclamation act of June 17, 1902 (32 Stat., 388, sec. 10.)

The act of 1905 should not, because it need not, be construed either as modifying the reclamation policy or as curtailing in the slightest degree the ability of the Secretary to render that policy effectual. Therefore, if we say that the act of 1905, being later than the reclamation act, was intended to reach the reclamation units, we must also say that its application there is subject to the broad supervisory and protective power of the Secretary under the reclamation act, and this without regard to whether the act of 1905, in its application to ordinary homestead claims, would permit the settler to convey the fee or only a conditional possessory right similar to his own.

Otherwise we should incur the absurdity of saying that Congress, without express words and contrary to the general presumptions in such cases, intended in this instance to confer upon the settlers a power without supervision, to dispose of the irrigable lands for railroads, cemeteries, schools, etc., without any limit whatsoever, without any consideration moving to the Government, and without any regard for the interests of fellow settlers or the Government, and that as against this extraordinary authority, the Government, with its enormous investments and extensive obligations, is theoretically without protection, save as it may rely upon the courts to prevent obstructions to existing canals.

III.

Construction and Application of the General Railway Act of March 3, 1875.

1. *Discussion of the applicability of this statute to lands which are subject to private claims.*

The Circuit Court decided and the appellants here insist that the statute applies only to the vacant public domain.

If this were so, we do not see that the case would be improved for the railway company, for its right would then be entirely dependent on the act of 1873, the significance of which we have attempted to explain above.

The Land Department seems to have construed the act of 1875 as applying only to lands to which no private rights or claims have attached. We believe, however, that the true view is the one adopted by the learned court below, and that the statute was intended to afford the means whereby the whole interest of the *Government* in the rights of way contemplated could be acquired consistently with the protection of the interests of private claimants where the lands traversed had been settled or filed upon.

The appellants' contention rests upon their interpretation of the term "public lands," as used in the first section of the act. It is true that this term has frequently been held by this court to exclude lands affected by private interests, and it is undoubtedly correct to say that in acts, whether

special or general, purporting to make grant of complete title, this is the interpretation which should be adopted in the absence of any satisfactory evidence of a contrary legislative intent; for, obviously, if such grants were not so restricted, Congress, with its plenary power over lands subject to possessory claims like unperfected homesteads, would be placed in the attitude of ignoring and overriding the settlers and others who were claiming in good faith under other laws.

But where, as was suggested in *Union Pacific R. R. Co.* v. *Harris*, 215 U. S., 386, 388—a case much relied on by the appellants and discussed on page 17 of their brief—it is " apparent either from the context or from the circumstances attending the legislation " that this term " public lands " was meant to include lands subject to private claims, as well as those that are not, the term will have the broader scope, the question being purely one of legislative intention. See opinion of court below (R., 205); *United States* v. *Blendaur*, 128 Fed., 910, 913.

Now, in the right-of-way act the words " public lands " are used in two places. In section 1 a right of way is granted over " the public lands," and in section 3 the Territorial legislatures are authorized to provide for the manner in which " private lands and possessory claims on the public lands of the United States " may be condemned. It is beyond question that " possessory claims " as here used

includes claims evidenced by entries as well as mere squatter rights. *Spokane Falls Ry. Co.* v. *Ziegler*, 167 U. S., 65; *Enoch* v. *Spokane Falls & Northern Ry. Co.*, 6 Wash., 393, 33 Pac., 966, 967; *Railway Co. v. Sture*, 32 Minn., 95; *Larsen* v. *Navigation Co.*, 19 Oreg., 240, 23 Pac., 974.

Congress having in the third section of this act expressly used the words "public lands" to designate lands of the United States affected by subsisting entries, the presumption is that so far as the mere right of way is concerned it used the same words in the same sense in section 1. We think that Congress by this act intended to provide a complete scheme by which railroad companies might acquire a perfect right of way over all lands not reserved or appropriated to the particular purposes of the United States; and to that end it provided means for acquiring a perfect right of way as against the Government, subject to existing private claims, and then added a compulsory method for obtaining rights from entrymen and settlers who refused to convey in accordance with the permission given them by Revised Statutes, section 2288.

If this were not so, title to those portions of a right of way which depended on transfers by deed or condemnation from mere possessory claimants might fail if their claims were forfeited or abandoned. The company, at all events, would not in such cases acquire any title good as against the Government. Here, of course, we realize that our opponents will say that the settler, even a mere

squatter, perhaps, is commissioned to convey the fee or a permanent vested easement, and that an equivalent title will be obtained by a condemnation of his possessory interest. But why insist on so anomalous and uncalled-for a way of alienating a public title when a reasonable construction of the statute allows the thing to be done in an orderly way by governmental action, through the approval of the Secretary of the Interior?

In *Washington & Idaho Railroad* v. *Osborn*, 160 U. S., 103, this court, construing this act, held that Osborn, a settler on unsurveyed land, who intended at the proper time to claim a preemption right, could not be dispossessed by a railroad company without proper compensation. The court, on the authority of *Buxton* v. *Traver*, 130 U. S., 232, 235, held that the settler, even though he had erected very valuable improvements, had not acquired any right whatever, as against the United States, saying (p. 109):

> It must, therefore, be conceded that Osborn did not, by maintaining possession for several years and putting valuable improvements thereon, preclude the Government from dealing with the lands as its own, and from conferring them on another party by a subsequent grant.

Nevertheless it was adjudged that his claim was one of the "possessory claims on the public lands of the United States" intended by the third section of the act, and must be condemned and paid

for as therein provided. Obviously, in condemning this settler's inchoate interest, the railroad company could not acquire nor should it be obliged to pay for the Government's fee. The proceeding would leave the Government's title untouched. The same thing would be true if the settler had filed a homestead claim. The Government's rights could be devested only by the filing and approval of a map as the statute prescribes.

There are very serious theoretical and practical objections to the idea of permitting a mere settler—one who may not even have filed a paper in a land office and who may be nothing better than an irresponsible nomadic squatter—to encumber the land of the Government in which he has acquired no interest whatever, and we find it impossible to believe that this statute, any more than the act of 1873, was intended to confer so unusual and uncalled for an authority.

The decisions of the Land Department upon which appellants rely appear to have assumed, quite unnecessarily we think, that if this statute were held applicable to the public lands to which private claims have attached the Secretary's approval of a location over such lands would vest the grantee immediately with a permanent easement in derogation of the equities of the claimants. But this theory, as we have seen, overlooks the fact that such claims are protected by the act itself and debars the grantee from the means of acquiring a uniform and certain title to its right of way.

2. *Under this statute no vested right arises against the Government until a map showing the railroad location has been filed with and approved by the Secretary of the Interior.*

Opposing counsel contend that, even if the statute be held to apply to entered lands, the railroad company had acquired a right of way as against the United States by filing its articles of incorporation and proofs of organization with the Secretary of the Interior and constructing a railroad over the lands in question. In support of this position they rely almost wholly upon the case of *Jamestown & Northern Railroad Co.* v. *Jones*, 177 U. S., 125.

(*a*) It is to be noted, however, that in that case there was a railroad completed and in operation upon the land when Jones took the first step to initiate a claim to it under the preemption laws, and that thereafter a map was filed by the company and approved by the Secretary of the Interior. On that state of facts the court held that, although the entry antedated both the filing and approval of the map, the claim of the company must nevertheless be deemed first in time, and, by relation, first in right.

In *Minneapolis, St. Paul, &c., Ry. Co.* v. *Doughty*, 208 U. S., 251, this court held that the doctrine of the *Jones case* could not be extended to a case in which the railway company at the time of the filing of a homestead entry had done nothing more upon the land than to stake out the central line of its road as finally located by its board of directors.

In the present case, when the bill was filed, the railroad company had merely staked out the line of its road and commenced the work of grading the roadbed. That work did not begin until about November 11, 1909, and this suit was commenced on December 29 following. The work, therefore, had been in progress about 48 days. The grading was substantially completed at the date of the final hearing, namely, on June 10, 1910, but not, so far as appears, in any part, when suit was begun. It is clear, therefore, that the doctrine of the *Jones case* does not apply here, even if that case is applicable in any case as against the United States. On the state of facts then existing the present case approaches more nearly to that of *Minneapolis, St. Paul, &c., Ry. Co.* v. *Doughty, supra.* As was said by the Circuit Court of Appeals in this case "the road has not been constructed and is not in operation over its projected right of way." (R., 209.)

(*b*) It is submitted, however, that neither the *Jones case* nor the *Doughty case* decided anything as to the rights of the railroad companies against the United States. No rights of either company as against the Government were involved. In each case the sole contest was between two private parties, each claiming priority of right over the other. And, while in the *Jones case*, this court advanced some reasons and used some language which, taken literally, would seem to indicate an opinion that, by construction alone, without the filing or approval of a map, a right of way might be acquired as

against the Government, yet it is respectfully suggested that these parts of the opinion were *obiter;* the case *decided* only that, by filing its articles of incorporation and constructing and operating its road before the preemption entry was made, the railroad company had initiated the first claim, and that its title, subsequently secured by the filing and approval of a map, related back to that time, cutting out the intervening claim of the preemptioner. The case is quite the same in principle as *Weyerhaeuser* v. *Hoyt*, 219 U. S., 380, in which, putting aside unnecessary expressions to the contrary in other decisions, it was held that the filing, by a railroad company, of a selection of lieu land initiates a *claim* and fixes a time to which the title will relate if the selection is subsequently approved by the Secretary of the Interior. This analogy was clearly pointed out in the case of *Stalker* v. *Oregon Short Line*, 225 U. S., 142, 149.

Taking the *Jones* and *Doughty cases* together and considering only the matters necessary to the decision of the questions actually involved, they are entirely consistent with each other and establish the law substantially as follows:

The filing of articles of incorporation and proofs of organization and the construction of a completed railroad give the company priority over one subsequently entering the land under the general land laws, though no map of the route has then been filed or approved; but the filing of such articles and the

definite location and staking out of the line without actual construction do not give such priority; and the filing and approval of a map do not relate back to the date of definite location so as to give priority over an intervening entry.

The provisions of the statute directly relevant to the present question are as follows:

> The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road. * * * (Sec. 1.)
>
> That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. * * * (Sec. 4.)

The first section employs words of present grant; but under a general law like this, in which no grantee is particularly named or intended, it is entirely clear that no grant takes place until a qualified grantee appears and performs the statutory conditions.

> There can not be a grant unless there is a grantee, and consequently there can not be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time.
>
> *Hall* v. *Russell,* 101 U. S., 503, 509.

The appellant railroad company did not come into existence until long after this law was enacted.

The grant of the swamp-land act is expressed in the present tense, but title does not vest thereunder until the lands have been identified and selected by the grantees and the selections approved by the Secretary of the Interior.

> *Little* v. *Williams,* 231 U. S., 335, 339.

The railway act declares that in order to secure its benefits the applicant *shall* file a profile of its road for the approval of the Secretary. There is certainly no expression in the statute, and we are

utterly unable to find there any ground for an implication, that a railway company may dispense with this condition entirely by merely appropriating the land. If title could be acquired in that manner, why not also under the swamp-land act and the acts governing the acquisition of lieu lands by railway companies?

As this court said in the *Doughty case, supra:*

> * * * But section 4 gives little play to construction or the analogies which the company invoke. That section determines the priority of rights between railroads and settlers by explicit language. A right of way is granted, but to secure it three things are necessary: (1) Location of the road; (2) filing a profile of it in the local land office; and (3) the approval thereof by the Secretary of the Interior, to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad and subjects the disposition of the land, under the land laws, to that right. "And thereafter," are the words of the statute, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." It would be a free construction of these words to give them the meaning for which the railroad company contends. They neither convey an unnatural sense or lead to an unnatural consequence. Unless rights under the act of 1875 and rights under the land laws were to be kept for an indeterminate time in uncertainty and possible con-

> flict, to fix some act or point of time at which they should attach was natural, and to construe language which is apt and adequate by its sense and arrangement to express one time to mean another, would be a pretty free exercise of construction. We admit that the letter of a statute is not always adhered to and words may be transposed, but the necessity for it must be indicated to accomplish the purpose of the legislation. There is always a presumption that the words were intended as written and in the order as written: certainly, when they express a definite sense which would be changed to another with different and opposing legal consequences. (208 U. S., 257.)

And in *Stalker* v. *Oregon Short Line, supra,* page 151, the court, referring to the *Doughty case,* observed:

> What is said in the opinion about the grant of a right of way being dependent upon the doing of three things—location of road, filing profile of it in the Land Office, and the approval thereof by the Secretary of the Interior—and that "*thereafter* all such lands over which such right of way shall pass shall be disposed of subject to such right of way," refers to the nonvesting of any right *as against the United States.*

The act of the Secretary in accepting the company's articles and approving its map is judicial in quality. It is this act which sets a grant in operation.

> When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands.
>
> *Noble* v. *Union River Logging Co.*, 147 U. S., 165, 172.
>
> See, also, *Weyerhaeuser* v. *Hoyt, supra,* and *Phoenix, &c., R. R. Co.* v. *Arizona, &c., R. R. Co.*, 9 Ariz., 434, 441.

In *United States* v. *Rickey Land & Cattle Co.*, 164 Fed., 496, 500, which involved rights of the United States in conflict with a private claim under the irrigation right of way law of March 3, 1891 (c. 561, secs. 18, 19, 26 Stat., 1101), the court, referring to section 19 thereof, which, *mutatis mutandis*, is identical in substance with section 4 of the railway act of 1875, says:

> It will be seen that by the express terms of this section, in order to acquire a right of way over public lands for canal and reservoir purposes under the act of which it forms a part, it is essential that the map of the location of the canal and the reservoir shall be approved by the Secretary of the Interior. Such approval is a condition precedent to the taking effect of the grant of right of way for the purposes named in the preceding section of the act.

It will be noted that the map must be filed in all cases, whether the lands traversed be surveyed at the time of location or not. In the present case the lands were surveyed and the map could have been submitted at any time.

The theory that a title may be acquired by construction was evidently induced by the thought that as, where the lands are unsurveyed at the time of location, the filing may or must be deferred until the public survey has been made, it could not have been intended to defer the construction correspondingly, especially since the *proviso* in section 4 apparently contemplates that the railroad shall be completed within five years after location. The argument, no doubt, affords ground for the conclusion that a company is licensed to proceed with construction over unsurveyed land, where there is no public objection, and with less reason it might be applied to surveyed land; but it affords no justification for converting a mere license into a vested right. Even the real or supposed inconvenience of leaving the company, with its railroad built, dependent for full title on further action by the Government, can not excuse the obliteration of the plain terms of a statute. This act declares that maps shall be filed in all cases. They must be passed upon by the Secretary of the Interior. If he finds that the applications conflict with the interests of the United States, or for any other reason go beyond the fair limits of the granting act, it is his duty to disapprove them, and the same reasons which would justify him in disapproving an application, if made, will justify his interference when a railroad company undertakes to construct its road without submitting its case to him for his determination.

If, however, the *Jones case* is to be taken as holding only that the existence of a completed railroad upon public lands is notice to an intending settler of a claim to a right of way, which when perfected by the filing and approval of a map is entitled to priority over his intervening entry, then the act is given full force and effect as it stands and manifest equities are preserved. Such a construction is not only consistent with the language of the statute but also with the general rules of law by which priority of right is determined as between claimants under the public land laws. As a rule, when two parties, by permission of Congress, go upon the public lands and erect structures of public or private utility with a view to the acquisition of an easement or title under the applicable land law, that party is prior in right who is prior in time. (*Shepley* v. *Cowan*, 91 U. S., 330, 338.) This rule is founded, in some cases, on the general policy of the land laws; in others, upon decisions of the courts intended to promote justice and recognize equities; and, in still others, upon express provisions of law, as in the case of settlements with a view to the acquisition of title under the homestead laws. (21 Stat., 140, sec. 3.) The rule applies, however, only as between the parties.

The act which gives priority to one party does not necessarily give any right as against the United States. Such a right is acquired only upon performance of those acts which are prescribed by Congress as the conditions upon which the right

or title shall pass from the Government. To give only the most familiar case, an actual settlement—the erection of a house and the establishment of a residence therein—gives the settler a right to be preferred over all subsequent comers in the acquisition of the Government title if the Government is to dispose of the title under the public land laws; but it initiates no right as against the Government. The latter may withdraw the lands from disposition, devote them to a public use, and oust the settler from his possession without making him any compensation. *Frisbie* v. *Whitney*, 9 Wall., 187; *Hutchings* v. *Low* (The Yosemite Valley case), 15 Wall., 77.

The rule of priority between claimants is no doubt founded in part at least on the idea that actual and lawful possession evidenced by some permanent structure, as the house of the settler, the ditch of the miner, or the constructed railroad, is notice to all comers of an existing claim which, if the Government continues to hold the land open to private acquisition, may ripen into a title by the performance of the conditions imposed by Congress. Let it be conceded that a railroad company upon the filing and approval of its articles of incorporation and proofs of organization may lawfully go upon the unreserved and unappropriated public lands under the statute now in question and construct its road. Under the rule above referred to it may acquire a priority before acquiring title. It may acquire both priority and title (a title for-

feitable for failure to construct) by the filing and approval of its profile map. It may acquire a right of priority alone by actual construction.

Definite and final location is no doubt the logical time for the beginning of priority; but as this court held in the *Doughty case, supra,* the mere staking out of a line is not sufficient *evidence* of definite location. Another intending claimant would have no knowledge of a resolution of the company's board of directors adopting the staked-out line as the final route, and the stakes might easily be removed to a different place. It is a matter of common knowledge that various surveys are usually made before a railroad company finally decides upon the route to be followed. Hence, as this court has in substance held, the permanent structure of a completed railroad is alone sufficient to apprize another of the company's occupancy and give it priority in the absence of a public record resulting from compliance with section 4 of the act.

The attitude of the Land Department upon the question now under discussion has not been uniform. The regulations explanatory of this act, approved in January, 1888, declared:

> The requirements of the law regarding the filing of the proper papers and maps are conditions precedent to the obtainment of the right to construct a railroad over the public lands, or to take therefrom material, earth, stone, and timber for its construction, or to occupy them for station or other purposes. It is therefore imperative that proper steps,

> as pointed out in this circular, should be taken by a company, and the approval of the Secretary of the Interior obtained, prior to the construction of any part of its road or its occupancy of the public lands in any manner. (12 L. D., 426.)

This declaration was reiterated as late as March, 1892 (14 L. D., 340), despite the dicta contained in the intervening decision of *Dakota Central R. R. Co.* v. *Downey*, 8 L. D., 115.

3. *The withdrawn lands were excluded from the operation of the statute by the terms of the statute itself.*

The fifth section of this act reads:

> That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

Lands withdrawn for disposition under the reclamation law are "lands especially reserved from sale" within the meaning of this section.

(*a*) Such lands are not sold by the Government. The settlers acquire title by residence and reclamation, and by fulfilling their obligation to reimburse the Government for the money laid out in constructing, maintaining, and operating the works (*Swigart* v. *Baker, supra*). The word "sale" has a definite technical meaning. There must be a money consideration for the thing sold. See Bouvier's Law Dict., 943; Rapalje & Lawrence Law

Dict., 1144; *Commonwealth* v. *Davis,* 12 Bush (Ky.), 240, 241; *Picard* v. *McCormick,* 11 Mich., 68, 77; *Schenck* v. *Saunders,* 13 Gray, 37, 41.

In *Williamson* v. *Berry,* 8 How., 495, 543, this court said:

> "*Sale*" is a word of precise legal import, both at law and in equity. It means at all times a contract between parties, to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold. Noy's Max., ch. 42; Shep. Touch., 244.

And in the *Five Per Cent cases,* 110 U. S., 471, 480:

> The question before us is not whether the promise by the Government of a bounty in land or money to persons entering the military service is a contract for valuable consideration; but whether, when carried into effect, it constitutes a sale by the Government; and it is quite clear that land granted by way of reward for military services has never been treated, in the legislation of the United States upon the subject, as sold, but has always been considered as analogous to money paid in a gross sum by way of bounty.

Lands acquired by settlers under the reclamation act are, like homesteads, in the nature of bounties.

See

Smith v. *Townsend,* 148 U. S., 490, 497.
Anderson v. *Carkins,* 135 U. S., 483, 488.
McCune v. *Essig,* 118 Fed., 273, 277.

Congress in its land laws appears to have employed the words "sale" and "purchase" with consistent regard for their technical meaning. Thus we do not find them in the homestead laws (R. S., secs. 2289–2291), or the reclamation act, but they are present in those acts which contemplate the disposition of the public land for a consideration consisting in whole or in part of money, such as the old laws providing for the sale of public lands at public entry and subsequent private entry (see R. S., secs. 2353–2379), now repealed by the act of March 3, 1891 (ch. 561, 26 Stat., 1099, sec. 9), and in the more modern acts, like the "Act for the sale of timber-lands," etc., of June 3, 1878 (20 Stat., 89), and the "Act to provide for the sale of desert lands," etc., of March 3, 1877 (19 Stat., 377).

(*b*) When this statute was enacted, to reserve lands "from sale" was synonymous with withdrawing them from all forms of disposition under the general land laws of the time. Speaking generally, all of the public lands not particularly reserved or affected by private claims were subject to purchase under the preemption law (when surveyed), Revised Statutes, section 2257 *et seq.*, or the mineral land laws, and salability was a condition to their acquisition under the other laws, such as the homestead and bounty laws, which did not demand a pecuniary consideration. The expression in the fourth section of the act therefore means to-day, giving it its freest interpretation, lands of a class

which the Government has specially set apart from general disposition, because either of some public plan or policy in regard to them, or to satisfy some grant or obligation of the Government.

The reclamation " units " fall clearly within the exception, not merely because they are not to be sold for money, but because they are withdrawn to accomplish a particular plan in the due execution of which they must be used by the Government (for the construction, extension, maintenance, and operation of canal systems), and their farming value protected and developed under governmental supervision; and because also they, or, more accurately, their usefulness, stands as a security for the Government's investment.

This special interest of the Government can not be said to be displaced until the payments required by the act have been made for the major portion of the lands, and the management and operation of the works pass from the Government to the farmers as the reclamation act prescribes (sec. 6).

4. *Independently of its own express provisions which require approval by the Secretary and exclude lands specially reserved, the act of 1875, when construed in pari materia with the reclamation act, does not authorize railroad construction in reclamation projects against the objection of the Secretary of the Interior.*

In view of what we have already said concerning the relations of the reclamation act to this statute

and to the act of 1873 as amended, it is quite unnecessary to discuss this proposition. Either we are wholly wrong in our conception of the rights and functions retained by the Government in the withdrawn areas of irrigable lands, or, necessarily, this proposition is correct.

CONCLUSION.

It is respectfully submitted that the decree of the court below should be affirmed.

ERNEST KNAEBEL,
Assistant Attorney General.
W. W. DYAR,
Attorney, Department of Justice.

OCTOBER, 1914.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

MINIDOKA & SOUTHWESTERN RAILROAD Company and Utah Construction Company, Appellants, *v.* THE UNITED STATES. — No. 19.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In the administration of the railway right of way act of 1875, and the analogous provisions concerning rights for irrigation purposes contained in the act of March 3, 1891 (c. 561, 26 Stat., 1101, secs. 18–21; see our original brief, p. 38), the function confided to the Secretary of the Interior is something more than the clerical or ministerial function of passing upon the mere form of articles of incorporation and maps of location. As was remarked by the court below (R., 209):

> The requirement of the statute that the railroad company shall file with the register and receiver the profile of its road and this

> profile shall be approved by the Secretary of the Interior before any right attaches, is an important and far-reaching provision, in view of the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands and particularly by section 441 of the Revised Statutes, wherein he is charged with the supervision of the public business relating to the public lands.

Therefore, in a number of the Secretary's decisions, it has been held that where the granting of an application will work harm to some interest of the Government approval should be refused.

Thus in the case of the *Denver, Northwestern & Pacific Ry. Co.* v. *Hydro-Electric Power Co.*, 32 L. D., 597, it was decided that the filing of the requisite papers and map of final location in due form, prior to the construction of the road, initiated no right which would prevent the Secretary from rejecting the application where it appeared that the granting of the right of way would interfere with a contemplated reclamation project; and the Secretary accordingly withheld his approval and directed that the lands involved be withdrawn under authority of the reclamation act.

In the case of *Continental Tunnel Railway Company*, 39 L. D., 86, it said:

> No right is acquired under the act of March 3, 1875, as against the United States by the simple filing of the articles of incorporation and the maps of location therein

> provided for, until the approval thereof by the Secretary of the Interior. At any time before such approval the land may be reserved from sale by the Executive authority for uses authorized by law which would defeat the application.

And it was held (we quote the syllabus) that (p. 86):

> Where an application for railroad right of way covers public lands upon which are possible power sites, examination should be had by the Land Department, before acting upon the application, to determine whether the lands may be utilized to the best advantage for power sites or other power purposes; and if it appear that the public good resultant from withholding the land for power development is disproportionate to the benefits to be derived from construction of the railroad, the application should be approved, even though it might interfere with development of the power; but if, on the other hand, the power possibilities are sufficient to justify utilization of the public lands for such purposes to the exclusion of other uses which may conflict, the lands should be withdrawn and the application rejected, unless the line of road can be so located as not to interfere or conflict with the use of the land for power purposes.

See, also, the case of *Skagit Power Company*, 39 L. D., 89, and the instructions of January 29, 1910, 38 L. D., 405 (annulled by that decision), which had gone so far as to require applicants for railroad

rights of way over lands where valuable power sites might be found to stipulate, as a prerequisite to approval, that they would upon proper request elevate or remove their tracks, etc., in the event of the withdrawal of lands for water-power purposes.

In the case of *Francis W. Bosco et al.*, 39 L. D., 104, the department refused to approve an application based on the act of March 3, 1891, *supra*, for a right to include certain public lands in Colorado in a reservoir designed to take water from the watershed of the Rio Grande. The refusal in this instance was in line with the policy adopted years before and consistently followed, to protect the headwaters of that stream from excessive diversions, lest the Engle Dam reclamation project in New Mexico—a project for which $1,000,000 had been appropriated by Congress and which involved an estimated cost of $7,000,000 or more—should become endangered. The project is designed to supply water for the irrigation of large areas of land in New Mexico and Texas, and also to provide water for use in Mexico pursuant to a treaty existing between this country and that Republic. In his decision the Assistant Secretary, referring to the claim that the contemplated diversion of water would work no injury, observed (p. 107):

> The department is by no means convinced that this is true, and in the absence of such conviction it is believed to be the duty of the Secretary of the Interior to exercise such discretion as is necessary to protect the interests of the United States.

In the case of *D. C. McWatters*, 41 L. D., 485, an application for a reservoir site was rejected because the use of the reservoir might work harm to the Minidoka reclamation project.

In *California-Nevada Canal, Water & Power Co.*, 40 L. D., 380, 384, which involved an application under the act of 1891 affecting lands within a national forest, the Assistant Secretary said:

> In the very necessities of the case, whatever might be said as to application under said acts for rights of way upon the unreserved public domain, it may not be successfully disputed that the exercise of this jurisdiction within a reservation of the United States involves the exercise of more than a mere legal discretion. In other words, that discretion may and should look beyond the technical sufficiency of the application and in broad view should subserve the interests of the whole people.

By the act of March 2, 1899, 30 Stat., 990, rights of way through Indian reservations for railway and other purposes are "hereby granted" to any railway company duly organized, etc., which complies with the provisions of the act. The act (section 3) provides that a road may be surveyed and located by permission of the Secretary, but that "before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment" of full compensa-

tion for the benefit of the Indians. In the case entitled *San Carlos Reservoir Site,* 40 L. D., 470, it was held that an application under this statute for a railway right of way through a narrow canyon, which formed the most feasible site in that region for impounding the waters of the Gila River, should be refused unless the company elevated its location to a contour above the reservoir site. At page 473 it is said:

> Certainly the railroad should not be permitted to destroy the possibilities incident to the irrigation of the arid lands in the valley, including Indian lands, and the resulting agricultural prosperity of that portion of Arizona, from which the railroad itself will ultimately derive a substantial benefit, especially where a change in the location of its line is reasonably possible.

It is submitted that the broad view of the Secretary's power is consistent with his broad general duties as the guardian of the public lands and the administrator of all the public land laws (*Knight* v. *Land Ass'n.*, 142 U. S., 161, 181; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S., 316); that it is consistent with the language of the right of way acts, which does not in terms abridge the discretion naturally implied in the word "approve"; and that it is essential to the proper protection of the Government, whose manifold interests might readily be impaired under such general statutes as these if no latitude of discretion were conceded in their execution.

If an application for a right of way for a railroad, or for a large irrigation canal, or reservoir, within a reclamation project, were submitted to the Secretary of the Interior, he, as the representative of the United States, and also of the whole body of reclamation settlers, would naturally be expected to consider very carefully the possible effects of such enterprises upon the welfare of the project, and we submit that it would be his plain duty to refuse his approval if he believed that harm would result. Indeed, it would be hard to imagine a condition of the law so utterly crude and improvident as one which would compel the guardian of so important a public interest to injure or destroy it by his own "approval."

This discretion to approve or disapprove is the discretion of the Secretary of the Interior. It exists as a peculiar means of governmental protection. Therefore it is not to be evaded by ignoring the Secretary and constructing the railway or canal in spite of his objection.

We earnestly submit that the orderly way in which to construe and execute these statutes is to require the railway company, or the canal company, to place its case before the Secretary of the Interior and obtain his decision, as is done in other cases arising under the general land laws. Section 4 of the railway act intends that this shall be done in all cases. The requirement is not inconsistent with the existence of a license to proceed with construc-

tion prior to approval, nor inconsistent with the idea that a railway company by construction alone may acquire rights which may not be displaced by the Land Department. But when there is a probability, or even a possibility, that the plan of the company may be hostile to the superior interests of the Government, and when the right of the company to proceed has been challenged on the Government's behalf, the company should stay its hand until the question can be duly considered and determined by the Secretary.

Whenever there is a fair question, such as would properly be addressed to the judgment and discretion of the Secretary if his judgment were requested, that question should be submitted to him as the officer or tribunal specially designated by the law to decide it.

> Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts can not take jurisdiction and proceed to decide such question themselves. The Government has provided a special tribunal for the decision of such a question arising out of the administration of the public land laws and that jurisdiction can not be taken away from it by the courts.
>
> (*Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S., 301, 315.)

The case cited involved a forest lieu land selection. In the case of *Williams* v. *United States*, 138 U. S., 514, 524, there was under consideration an act of Congress granting lands to the State of Nevada and providing that, when selected, they should be certified to the Commissioner of the General Land Office "and approved by the Secretary of the Interior." (21 Stat., 287.) Here apparently was a direct mandate to the Secretary to approve the selections, and no reference was made to any discretion to be exercised by him. It appeared, however, that the approval was being sought in the interest of one who had entered the same land as a desert claim, assigned it illegally to an innocent third party, had subsequently relinquished the claim to the Government, and was now endeavoring to secure the title for himself. Although there was no pending claim, and apparently no method short of a special act of Congress under which the land could have been granted to the injured third party, this court held that, under the circumsances, it was the duty of the Secretary to withhold his approval of the State selection to await congressional action if necessary, and that a certification of the tract, which had issued inadvertently, was properly canceled by the decree under review. It declared that the Secretary's *approval* of such selections was "no mere formal act"; that he was allowed no arbitrary discretion, but did have power to prevent the injustice sought to be perpetrated; and that to meet

the "matters not foreseen," and "equities not anticipated," arising in "such large and varied interests as are intrusted to the Land Department," * * * "the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unforeseen contingencies, to do justice."

See, also, *St. Paul, M. & M. Ry. Co.* v. *Sage*, 71 Fed., 40, 49; *Buttz* v. *Railroad Co.*, 119 U. S., 55, 72.

Respectfully submitted.

ERNEST KNAEBEL,
Assistant Attorney General.
W. W. DYAR,
Attorney, Department of Justice.

OCTOBER, 1914.

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MINIDOKA & SOUTHWESTERN RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 19. Argued October 29, 30, 1914.—Decided November 30, 1914.

Under the policy of the Government to encourage the building of railroads in the western States, Congress has in some cases granted land to aid in construction and has also provided the means by which those companies not having such grants can, under reasonable conditions, acquire rights of way over public lands.

While the right of way statute only applies to public lands and, therefore, does not apply to lands segregated from the public domain by homestead entries, settlers may, under § 2288, Rev. Stat., grant rights of way over land before final proof.

Nothing in the Reclamation Act of June 17, 1902, 32 Stat. 388, affects the provision of § 2288, Rev. Stat., permitting a homesteader without patent, but in lawful possession, to grant to a railroad company a right of way across his claim.

The privileges for granting to railroad companies rights of way over homesteaders' land under entry were renewed and extended by the act of March 3, 1905, c. 1424, 33 Stat. 991.

In this case, *held* that the various acts of Congress in effect operated to give the consent of the United States to the construction of a railroad as an instrumentality of commerce across the lands of those homesteaders within the limits of the Minidoka Irrigation Project in Idaho who gave deeds for the right of way to the railroad company.

190 Fed. Rep. 491, reversed, and 176 Fed. Rep. 762, affirmed.

THE facts, which involve the construction of acts of Congress regarding railroad rights of way and the right of entrymen within the reclamation projects to deed rights of way for railroads, are stated in the opinion.

Mr. Henry W. Clark and *Mr. A. A. Hoehling, Jr.*, with whom *Mr. P. L. Williams* was on the brief, for appellants:

The authority to convey a right of way for railroad pur-

poses expressly given to homestead settlers by § 2288, Rev. Stat., is not impaired by the provisions of the Reclamation Act.

The lands in question were not public lands and there was no authority under the general right of way act of 1875 for the filing or approval of a map of definite location affecting them.

The right of way granted by the homestead settlers under the authority of § 2288 is complete and perfect. The statute itself operates as the consent of the Government to subject its interest in the land to the right of way during the life of the homestead entry and also after forfeiture of the homestead.

The dictum of the Circuit Court of Appeals that the general right of way act requires the filing of a profile of the road rather than a map of alignment or definite location is contrary to the practice of nearly forty years.

In support of these contentions see *Alexander* v. *Kansas City R. R. Co.*, 138 Missouri, 464; *Bardon* v. *Nor. Pac. R. R. Co.*, 145 U. S. 535; *Barker* v. *Harvey*, 181 U. S. 481; *Dakota Cent. R. R. Co.* v. *Downey*, 8 L. D. 115; *Jamestown &c. R. R. Co.* v. *Jones*, 7 No. Dak. 619; *S. C.*, 177 U. S. 125; *Kern Valley Water Co.*, 15 L. D. 577; *Montana Cent. R. R. Co.*, 25 L. D. 250; *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190; *Regulations under General Right of Way Act*, 33 L. D. 481; *Santa Fe &c. R. R. Co.*, 22 L. D. 685; *Stalker* v. *Oregon Short Line*, 225 U. S. 142; *Un. Pac. R. R. Co.* v. *Harris*, 215 U. S. 386; *United States* v. *Buchanan*, 232 U. S. 72.

Mr. Assistant Attorney General Knaebel, with whom *Mr. W. W. Dyar* was on the brief, for the United States:

The right to build and operate a railroad through a reclamation project without consulting the Government

should not be adjudged to exist unless plainly conferred by some act of Congress.

The act of March 3, 1873, as amended, does not empower the entrymen to authorize the construction of a railroad through a reclamation project without the consent of the Secretary of the Interior.

The act merely authorizes the settler to relinquish in part the privileges which he enjoys under the settlement law, not to convey the title or to impair in any way the interest of the Government.

As to lands which, like the lands of reclamation projects, are affected by a special public interest, the act of March 3, 1873, if applicable at all, should be construed as a means of securing the consent of the settler to the uses mentioned, but not to permit those uses in the absence of governmental approval.

Construed *in pari materia* with the Reclamation Act, the act of March 3, 1873, as amended, can be deemed operative only in so far as consistent with the proper management and welfare of such projects. This necessarily implies that the transfers of the settlers must remain ineffectual if not approved or if objected to by the Government through the Secretary of the Interior.

Under the statute no vested right arises against the Government until a map showing the railroad location has been filed with and approved by the Secretary of the Interior.

The withdrawn lands were excluded from the operation of the statute by the terms of the statute itself.

Independently of its own express provisions, which require approval by the Secretary and exclude lands specially reserved, the act of 1875, when construed *in pari materia* with the Reclamation Act, does not authorize railroad construction in reclamation projects against the objection of the Secretary of the Interior.

In support of these contentions see *Anderson* v. *Carkins*,

135 U. S. 483; *Buxton* v. *Traver*, 130 U. S. 232; *Cascade Corporation* v. *Railsback*, 59 Washington, 376; *Commonwealth* v. *Davis*, 12 Bush (Ky.), 240; *Dakota Cent. R. R. Co.* v. *Downey*, 8 L. D. 115; *Davis* v. *Foreman*, 14 L. D. 146; *Eimer* v. *Wellsand*, 93 Minnesota, 444; *Enoch* v. *Spokane Falls & N. Ry. Co.*, 6 Washington, 393; *Five Per Cent Cases*, 110 U. S. 471; *Frisbie* v. *Whitney*, 9 Wall. 187; *Hall* v. *Russell*, 101 U. S. 503; *Hutchings* v. *Low*, 15 Wall. 77; *Jamestown & N. R. R. Co.* v. *Jones*, 177 U. S. 125; *Knight* v. *Land Ass'n*, 142 U. S. 161; *Larsen* v. *Navigation Co.*, 19 Oregon, 240; *Little* v. *Williams*, 231 U. S. 335; *McCune* v. *Essig*, 118 Fed. Rep. 273; *Minneapolis, &c. Ry. Co.* v. *Doughty*, 208 U. S. 251; *Noble* v. *Union River Logging Co.*, 147 U. S. 165; *Phœnix &c. R. R. Co.* v. *Arizona R. R. Co.*, 9 Arizona, 434; *Picard* v. *McCormick*, 11 Michigan, 68; *Railway Co.* v. *Sture*, 32 Minnesota, 95; *Schenck* v. *Saunders*, 13 Gray, 37; *Scott* v. *Carew*, 196 U. S. 100; *Shepley* v. *Cowan*, 91 U. S. 330; *Smith* v. *Townsend*, 148 U. S. 490; *Spokane Falls Ry. Co.* v. *Ziegler*, 167 U. S. 65; *Stalker* v. *Oregon Short Line*, 225 U. S. 142; *Swigart* v. *Baker*, 229 U. S. 187; *Union Pac. R. R. Co.* v. *Harris*, 215 U. S. 386; *United States* v. *Blendaur*, 128 Fed. Rep. 910; *United States* v. *Minidoka & S. W. R. R. Co.*, 176 Fed. Rep. 762; *S. C.*, 190 Fed. Rep. 491; *United States* v. *Rickey Land Co.*, 164 Fed. Rep. 496; *Washington &c. R. R. Co.* v. *Osborn*, 160 U. S. 103; *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380; *Wilcox* v. *Jackson*, 13 Pet. 496; *Williamson* v. *Berry*, 8 How. 495; Act of March 3, 1873, 17 Stat. 602; Act of March 3, 1875, 18 Stat. 482; Act of March 3, 1877, 19 Stat. 377; Act of June 3, 1878, 20 Stat. 89; Act of March 3, 1891, 26 Stat. 1097; Act of June 17, 1902, 32 Stat. 388; Act of March 3, 1905, 33 Stat. 991; Rev. Stat., §§ 2257, 2288, 2289–2291, 2353–2379.

See also Bouvier's Law Dict. 943; Rapalje & Lawrence Law Dict. 1144; Regulations under Act of March 3, 1875, 12 L. D. 423; 14 L. D. 338.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Minidoka & Southwestern Railroad Company was authorized by its charter to build its road along a line which ran through the Minidoka Irrigation Project in the State of Idaho. Homesteaders, without patents but lawfully in possession of irrigable land within the reclamation area, granted rights of way over their settlements to the Railroad Company.

When the Company began to build the United States sought to enjoin the work on the ground that a railroad could not be built across lands within a reclamation area without the consent of the Government. It was also claimed that the necessary embankments, excavations, bridges and culverts would interfere with the success of the irrigation works. The Company answered and relied on the conveyances from the homesteaders. After a hearing the District Court denied the injunction but made provision that the culverts should be so built as not to interfere with the flow of water through the canals and ditches (176 Fed. Rep. 762). This decree was reversed by the Circuit Court of Appeals (190 Fed. Rep. 491) on the ground that the lands in the reclamation area, though in possession of settlers, were public lands within the meaning of the Right of Way Act (March 3, 1875, c. 152, 18 Stat. 482) and that before its road could be built through the Minidoka Irrigation works the Company must obtain the consent of the Secretary of the Interior. From that decree an appeal was taken to this court.

It has always been the policy of the Government to encourage the building of railroads in the Western States, and many land grants have been made by it to aid in their construction. Congress has also provided a means by which those companies having no such grants could acquire rights of way over any portion of the public land by filing a map of definite location and securing its approval

by the Secretary of the Interior (18 Stat. 482). This law, however, by its very terms applies only to "public lands" and hence cannot be construed to empower the Secretary to authorize the building of roads across lands which had been segregated from the public domain by the entry and possession of homesteaders or preëmptors. *Bardon* v. *Northern Pac.*, 145 U. S. 535, 538; *United States* v. *Buchanan*, 232 U. S. 72, 76, and cases cited. On the other hand, settlers, without patent, were not in a position to make deeds to rights of way, not only because they had no title but also because they were prohibited from alienating such land before final proofs. Rev. Stat., § 2291. The consequence was that neither the Government nor the homesteaders could make such grants, and as the Company could not build without an assured title to its right of way, it was practically impossible to construct railroads through territory which consisted partly of public lands and partly of that which was in the possession of settlers. But it was greatly to their interest and to that of the Government that such a highway should be constructed and in order to meet the difficulty, Congress, on March 3, 1873, c. 266, 17 Stat. 602 (Rev. Stat., § 2288), passed an act providing that any *bona fide* settler might convey by warranty against his own act any part of his claim "for church, cemetery, or school purposes or for the right of way of railroads." Under this act the appellant could have constructed its road along the strip conveyed to it by the homesteaders unless, as claimed by the Government, the provisions of Rev. Stat., § 2288 as amended (March 3, 1905, c. 1424, 33 Stat. 991) have been repealed as to lands within irrigation projects and the completed Minidoka Irrigation Works.

Counsel for the United States contend that the Reclamation Act (June 17, 1902, c. 1093, 32 Stat. 388) requires that when an irrigation project is undertaken the Secretary of the Interior shall define its limits and withdraw all the

irrigable land therein from the public domain and from the operation of the general land laws: It is argued that when thus withdrawn the irrigation area constitutes a unit in which the United States has such a special interest as to require that it shall be subject to the supervision of the Secretary—he, in order to secure the success of the undertaking, having it in his power to decide whether a railroad should be built, and if so, along what line and across what lots it should be constructed. It is also argued that settlers having no patents ought not to be in a position to grant a right of way over lands which they do not own and may never acquire and thereby impose a burden upon the claim if it should afterwards come into the hands of other homesteaders.

These considerations, however, have not induced Congress to change its policy of encouraging the construction of railroads along routes designated by charters and over land in the possession of settlers. Neither have they induced Congress to confer upon the Secretary the power to grant rights of way through irrigation lands in the possession of homesteaders.

It is true that the Reclamation Act of June 17, 1902 (c. 1093, 32 Stat. 388), provides that when the Secretary of the Interior determines upon an irrigation project he must define its limits and "withdraw the irrigable lands therein from all forms of settlement, except under the homestead law," and all settlements therein shall be "subject to the limitations, charges, terms, and conditions provided in the Reclamation Act." And it is further true that the provisions of this statute do, in several important respects, modify the homestead law. The Secretary can limit the size of the homestead to ten acres, instead of the 160 acres permitted by the general law. The settler, instead of being entitled to receive a patent at the end of 5 years on compliance with the statutory conditions (Rev. Stat., §§ 2289–2291), is not permitted to make final proof and

receive a patent until he has reclaimed one-half of the irrigable area for agricultural purposes, and has also paid his proportionate share of the cost of the irrigation system in instalments,—the last of which may not mature for ten years after entry.

There are, possibly, other provisions to meet the special conditions of lands constituting an irrigation plant. But except as modified by the specific terms of the Reclamation Act, such lands are distinctly made subject to entry under the provisions of the homestead law, and all of the homesteaders' rights therein are the same as if the settlement had been located outside of the limits of irrigation works. One of the privileges, not affected by the Reclamation Act, is that which permits the homesteader, without patent, but in lawful possession, to grant to a railroad company a right of way across his claim; and whatever reason there was for conferring this right upon those who entered land in a sparsely settled section is doubly operative as to land located within the more thickly populated reclamation areas. Manifestly this is true as to so much as may be needed for churches and school houses. It is equally so as to rights of way for railroads and other public utilities needed by the numerous residents living within the irrigation areas.

An act passed since the Reclamation Act of 1902 serves, if possible, to make clearer the fact that Congress did not intend to deprive settlers on these or any other class of lands from granting railroad rights of way. For on March 3, 1905 (33 Stat. 991), after the establishment of the Minidoka Project, Congress amended Rev. Stat., § 2288 so as to provide that "any *bona fide* settler under the preemption, homestead, *or other settlement law* shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephone, canals, reservoirs, or ditches. . . ." These

privileges were renewed and extended by this act because of the public benefits to be derived from such utilities. When, therefore, the Minidoka & Southwestern Railroad Company, in 1909, secured grants to the continuous strip through the reclamation area, the Company, by virtue of these public statutes and the private grants, was authorized to construct its road not only across the agricultural lands, but over the intervening ditches and canals. For, while the latter formed a part of the irrigation unit, they were also particularly appurtenant to the lands through and along which they ran.

These various acts of Congress operated to give its consent, in advance, to the construction of such a highway and instrumentality of commerce, notwithstanding any interest the United States may have had in the lands described in the deeds from the homesteaders to the Railroad Company.

The decree of the Circuit Court of Appeals is reversed and that of the Circuit Court for the District of Idaho is affirmed.